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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED TRANSPORTATION UNION,
Petitioners,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
SOUTHERN RAILWAY COMPANY, AND
INTERSTATE RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the lower courts err in concluding that the Interstate Commerce Commission (ICC), and not the district courts, had jurisdiction to consider a labor union's complaint that several rail carriers were violating the Railway Labor Act by transferring employees from one collective bargaining agreement to another pursuant to an arbitration award purportedly conducted under the employee protective conditions imposed by the ICC as a condition of a rail exemption under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 11343?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The United Transportation Union ("UTU" or "Union") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the court of appeals affirming the decision of the district court which dismissed UTU's complaint for lack of subject matter jurisdiction is reported at 822 F.2d 1114 (D.C. Cir. 1987), and is reproduced herein as Appendix A.[1] The decision of the district court

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[1] References to pages of the appendices will hereinafter be referred to as App. — at ——.

is reported at 627 F. Supp. 1008 (D.D.C. 1985) and is reproduced herein as App. B. The decisions of the Interstate Commerce Commission ("ICC" or "Commission") which were relied upon by the district court and the court of appeals are not reported and are reproduced herein as App. C and App. D. The separate judgment of the court of appeals is reproduced herein as App. E.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1987.[2] On September 22, 1987, Chief Justice Rehnquist granted petitioner's request for an extension of time in which to file this petition, to and including October 28, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions at issue are Sections 2 Seventh, 6 and 7 First of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152 Seventh, 156 and 157 First, and Sections 10505 and 11341(a) and 11347 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505, 11341(a) and 11347.

Section 2 Seventh of the RLA provides:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Section 7 First of the RLA provides, in pertinent part:

> Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not

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[2] Petitioner filed a petition for rehearing which was untimely because it was filed by mail on July 30, 1987. Petitioner filed a motion for leave to file instanter which was denied by the court of appeals on September 25, 1987. Copies of the court of appeals' orders are reproduced herein as App. F.

> settled . . . [by the dispute resolution mechanisms of the RLA] . . . such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration board . . . *Provided however*, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such a party by the terms of this Act or otherwise. [Emphasis in original].

Section 10505 of the ICA provides, in pertinent part:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> > (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
> >
> > (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

The pertinent statutory provisions are reproduced in full in App. G.

STATEMENT

This case concerns the integration of certain operations of various Norfolk Southern Corporation ("NS") subsidiaries (collectively referred to herein as the "Railroads"); specifically, the joint operation of the Interstate Railroad Company ("Interstate") by the Southern Railway Company ("Southern") and the Norfolk and Western Railway Company ("N&W"). Those transactions are subject to approval by the ICC under Section 11343 (a)(2) of the ICA (49 U.S.C. § 11343(a)(2) which requires that railroads which desire to consolidate their operations obtain prior ICC approval of the transaction.

However, under 49 U.S.C. § 10505(a), the Commission must exempt a transaction from the requirements of the ICA when it determines that application of those requirements is "not necessary to carry out" the national rail transportation policy and either the transaction "is of limited scope," or regulation is "not needed to protect shippers." In 1980, the ICC issued a class exemption relieving all affilitaed rail carriers from the prior approval requirements of Section 11343(a) for intra-corporate family coordinations of operations such as those involved here. 49 C.F.R. 1180.2(d).

On February 25, 1985, the Railroads exercised the exemption from the prior approval requirements of Section 11343(a) under 49 C.F.R. 1180.2(d). App. C at 37a. Because of the express commands of 49 U.S.C. § 10505 (g)(2), the Railroads were not relieved of their obligations under Section 11347 and were therefore, required to provide arrangements for the protection of employees adversely affected by the transaction.[3] The employee protection arrangements required by the ICC's Order were the so-called *Mendocino Coast and Norfolk and Western* conditions. App. C at 38a.[4]

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[3] Under Section 10505(g)(2), the Commission's exemption authority does not include authority "to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle." Since the consolidation of the Railroads' operations was governed by Section 11343 and since arrangements for the protection of employees adversely affected by a Section 11343 transaction are mandatory under Section 11347, the Commission was required to condition its exemption on the Railroads' provision of appropriate employee protection arrangements.

[4] As the Court of Appeals noted:

> The *Mendocino Coast* conditions derive from *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 I.C.C. 732 (1978), *modified*, 360 I.C.C. 653 (1980). The *Norfolk and Western* conditions derive from *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605

Before the Commission had even acted on the requested exemptions and addressed the employee protection issues, the Railroads notified the Union that they proposed that Interstate's employees would no longer be covered by the UTU-Interstate collective bargaining agreement but rather would be covered by the N&W agreement. Additionally, the Railroads advised that they intended to reassign N&W and Interstate employees, to change the reporting cities of those employees and to consolidate their seniority rosters. App. A at 7a. The Railroads requested negotiations on an implementing agreement to accomplish those objectives. Although the Union challenged the carriers' ability to require such changes to existing rates of pay, rules and working conditions, it nonetheless bargained with the carriers on their proposals and reached a tentative agreement on those changes necessary to enable the carriers to implement the consolidation of operations, but refused to agree to transfer the Interstate employees to the N&W Agreement. UTU presented the

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(1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980).

(App. A at 3a-4a) and that:

> *Mendocino Coast* provides for full wages and benefits for dismissed employees for up to six years, and, for employees transferred to lower paying jobs, a displacement allowance equal to the difference between their prior and subsequent earnings. The *Norfolk and Western* conditions contain similar provisions.
>
> Under both *Mendocino Coast* and *Norfolk and Western*, either the carrier or the union may ultimately call for arbitration if the two sides fail to conclude what is commonly termed an "implementing agreement."

The Court of Appeals further noted that any transaction which will result in the rearrangement of forces must provide for selection of forces pursuant to an implementing agreement or an arbitration decision. App. A at 4a. *See also* this Court's description of the *Mendocino Coast* conditions in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. ——, 96 L. Ed.2d 222, 231 (1987).

carriers' full proposal, including the transfer to the N&W Agreement, to the Interstate employees involved who unanimously rejected the proposed agreement because they objected to being transferred to the N&W collective bargaining agreement. *Id.*

After respondents obtained the necessary exemptions, they sought to submit the dispute to arbitration under the ICC's employee protection conditions which required the railroads to enter into an agreement to provide for the selection and assignment of forces. App. B at 27a. The Union objected that an arbitrator could not compel Interstate's employees to accept transfer to a new collective bargaining agreement or to accept changes in working conditions such as seniority rights, arguing that changes in collective bargaining agreements may be effected only through procedures under the RLA. App. A at 8a. In an earlier filing with the ICC the Union objected to that portion of the Railroads' notice of exemption which proposed to change existing collective bargaining rights asserting that an ICC exemption did not relieve the Railroads of their obligations under the RLA. The ICC however concluded that there was "[n]o evidence" that the Railroads intended to abrogate the employees' contractual and statutory rights, and stated that although Section 10505 did not exempt the Railroads from compliance with "applicable laws and agreements relative to labor relations," an ICC exemption proceeding was not the "appropriate forum" to resolve those issues. *Id.* The Railroads, over the UTU's objections, submitted their proposed changes in collective bargaining agreements to an arbitrator. The arbitration proceeded and despite the UTU's argument that the arbitration panel could not transfer Interstate's employees to the N&W collective bargaining agreement, the arbitrator adopted the Railroads' proposal. App. A at 9a.

The Union then filed its complaint in the district court, asserting that implementation of the Railroads' proposal

would violate the employees' rights under the RLA and that under Section 7 First of the RLA, 45 U.S.C. § 157 First, the Union could not be compelled to submit the dispute to binding arbitration. The district court dismissed the complaint finding that the suit was a challenge to the arbitration award which was either a final order of the ICC appealable only to the court of appeals or not a final order, in which case it could be challenged only at the ICC. App. A at 10a.

The court of appeals affirmed the district court's decision concluding that the arbitration award was "functionally an 'order of the Commission' within the meaning of 28 U.S.C. § 2321(a)" [authorizing appeal of ICC decisions to the court of appeals], that the complaint was therefore a collateral attack on the arbitration award and that the district court therefore lacked jurisdiction of the complaint. App. A at 13a. The court rejected UTU's contention that because it alleged that the Railroads' actions violated the RLA, the district court had jurisdiction under 28 U.S.C. § 1331 and that pursuant to 28 U.S.C. § 1337 the district court also had jurisdiction to determine whether the ICC's order exempted the Railroads from compliance with the RLA.

REASONS FOR GRANTING THE WRIT

This case concerns a recurring jurisdictional question which involves the relationship between two important statutes which regulate interstate commerce: the Railway Labor Act and the Interstate Commerce Act. The Court below held that the ICC's authorization of an exemption in the transaction among NS' subsidiaries precluded district court jurisdiction of the union's claim that the implementation of that transaction violated the RLA. However, the court of appeals' decision is premised upon a fundamental misconception about the authority and functions of the ICC; moreover it is in conflict with decisions of this Court and two other courts of appeals

which have held that once the ICC determines that a transaction is consistent with the policies of the ICA, authorizaion of the transaction is automatic; no occasion is presented for consideration of conflicting statutory commands. *Schwabacher v. United States*, 334 U.S. 182, 194-195 (1948); *Brotherhood of Locomotive Engineers v. Chicago and North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963); *Brotherhood of Locomotive Engineers v. Boston & Maine Corporation*, 788 F.2d 794, 801 (1st Cir. 1986).

Moreover, the decision of the Court below is inconsistent with views expressed by four of the Justices of this Court in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. ——; 96 L. Ed. 2d 222 (1987) [hereinafter "*BLE* case"], which touched upon the ultimate issue not reached in the instant case because of the court of appeals' resolution of the jurisdictional question: Whether an ICC decision can override employee rights under the RLA, and if so, under what circumstances. Although this Court held that the appeal in the *BLE* case had not been timely filed, the four concurring justices stated that: "Any tribunal that is faced with a claim that a party [to an ICC approved transaction] is violating some 'other law' [*e.g.*, the RLA] has the responsibility of determining whether" it is necessary that the ICC's decision overrides the other law. *Id.* at 247 n.13.

The court of appeals' decision is based on a fundamentally erroneous interpretation of the ICA which is in conflict with a decision of this Court and two other courts of appeals. The implication of the court of appeals' decision removing the judicial mechanism for enforcement of employee rights under the RLA is the Unions' resort to self-help for enforcement of employee rights under the RLA since employees are given no other enforcement mechanism. UTU submits that this Court should grant this petition for a writ of certiorari in order to ensure

the orderly administration of the two statutes regulating interstate commerce which, as a result of the court of appeals' decision are now in conflict.

1. There can be no dispute that reassignment of employees from one corporate subsidiary to another with consequent changes in collective bargaining agreement coverage and in substantive terms of employment is a change in working conditions; and that under the RLA, such changes cannot be implemented without notice and negotiations with the union and completion of RLA negotiation and mediation procedures.[5] Accordingly, UTU's complaint that the Railroads had violated the RLA by implementing the reassignment of Interstate's employees without compliance with RLA procedures stated a claim under the Railway Labor Act which was cognizable in the district court. The ICA was implicated only because the Railroads asserted the arbitration award as a defense to the Union's claims under the RLA. However, the district court had jurisdiction of the Union's cause of action under the RLA pursuant to 28 U.S.C. § 1337(a) and it had jurisdiction of the Railroads' ICA defense, pursuant to its jurisdiction of actions arising under laws regulating interstate commerce, 28 U.S.C. § 1337(a). The court below nonetheless held that the district court lacked jurisdiction of the unions' complaint because it determined that the ICC had authority to "diminish rights said otherwise to be conferred by the RLA", that "the delegation [of that authority to the arbitrator] was necessarily implicit" in the ICC's exemption order and that the complaint was therefore a collateral attack on the arbitration award, review of which lies exclusively in the courts of appeals. App. A at 13a. That determination was premised upon a fundamental misconception about the authority and functions of the ICC in cases such as this one.

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[5] *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 722-724, 728-730 (1945); *Detroit and Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142, 145-150 (1969).

The ICC order in this case was issued pursuant to 49 U.S.C. § 10505 (App. G at 48a-49a) which requires the ICC to exempt certain transactions from regulation under the Interstate Commerce Act, when regulation is not necessary to carry out the policies of that statute. *Simmons v. ICC*, 760 F.2d 126, 131 (D.C. Cir. 1985); *Brae Corp. v. United States*, 740 F.2d 1023, 1054 (D.C. Cir. 1984). However, Section 10505 contains no authority for the Commission to exempt a railroad from complying with any other statute. Rather, it provides only that the ICC shall exempt a person or a transaction from compliance with the ICA if it finds that regulation is not necessary to carry out the national rail transportation policy and either the transaction is of limited scope or regulation is not necessary to protect shippers from abuse of market power. App. G at 48a-49a. Nowhere in Section 10505 is the ICC given authority to exempt railroads from compliance with *other* statutes. Indeed, as the courts of appeals noted, the ICC itself, in this very case, stated that:

> Although exemptions under 49 U.S.C. 10505 do not operate to relieve carriers of applicable laws and agreements relative to labor relations, this [exemption] proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

App. A at 8a, quoting ICC Finance Docket No. 30582 (Sub-No. 1, April 1, 1985) App. D at 41a.[6] Thus the

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[6] The panel accepted the district court's dismissal of this recognition by the ICC of the limits of its authority under Section 10505 as merely constituting a deferral of any pronouncement about the relationship between the *Mendocino Coast* conditions and the RLA until the arbitration panel had addressed the issue. App. A at 9a. However, there is simply no basis for drawing that inference from the ICC's statement, and it is plainly contrary to Section 10505 itself.

Court of Appeals' decision is contrary to the plain language of Section 10505.

The error in the analysis of the Court below is further illustrated by comparison of Section 10505 with the provision of the ICA from which the NS transaction was exempted: 49 U.S.C. § 11343. Section 11341(a)(1) provides that Commission authorization of rail consolidations and mergers exempts them from "antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . . ." That provision specifically provides that the Commission's authorization of a transaction can override "other laws" when it is *necessary* for the parties to be able to carry out the subject transaction. *Schwabacher, supra*, 334 U.S. at 195; *City of Palestine, Texas v. United States*, 559 F.2d 408, 414-415 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).[7] *See also* the concurring opinion in the *BLE* case, *supra*: "There may of course be some limitations on the types of matters the ICC can approve as part of the transaction", citing the holding in *City of Palestine, Texas*, that the ICC's authority to override other law is limited to those circumstances germane to the success of the approved transaction. 96 L. Ed. 2d at 246, n.11. Moreover, in 1982, Congress made the immunity provision of Section 11341(a) applicable to motor carrier exemptions under Section 11343(e) (Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 110) but expressly did not extend that immunity to rail exemptions. H. Rpt. No. 97-780, 97th Cong. 2d Sess. at 56 (1982). By contrast, Section 10505 contains no grant of authority for an ICC decision to override other law; and no such authority can be inferred from the language

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[7] *Schwabacher* and *City of Palestine, Texas* were decisions involving the predecessor to Section 11341(a), Section 5(11) of the ICA, which was renumbered as Section 5(12) in 1976 and was recodified as Section 11341(a) in 1978. See Pub. L. No. 95-473, 92 Stat. 1337, 1434. The recodification was without substantive change. Section 3(a) of Pub. L. No. 95-473, 92 Stat. 1466.

of that provision. It must be assumed that by omitting a similar grant of authority in Section 10505, Congress did not intend that the Commission would override other law when it exempted a transaction from prior approval under the ICA.

The court of appeals however held that exemption from ICC regulation implicitly included an exemption from the RLA and a delegation of authority to the arbitrator to make such a determination. Accordingly, it held that the district court therefore lacked jurisdiction of the Unions' claims that the Railroads' unilateral implementation of the changes in operations and trackage rights would violate the RLA rights of the employees involved. The result of the court of appeals' decision was that the RLA rights of the employees involved were superseded without any finding by a court that the voiding of their rights was necessary for the Railroads to effectuate the transaction, simply because the ICC had exempted the subject transaction from prior review under the ICA.

The court of appeals' conclusion that a Section 10505 exemption of a transaction from prior Commission approval under Section 11343 also constitutes an exemption from compliance with the RLA, such that the Union's district court action was a collateral attack on the ICC decision and/or the arbitrator's decision renders superfluous the requirement of a finding of necessity under Section 11341, is without any support in the language of Section 10505 and is plainly inconsistent with well-established precedent under Section 11343.[8]

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[8] Furthermore, the panel's reasoning is at odds with "a cardinal principle of statutory construction that repeals by implication are not favored." (*Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982)), and that when two statutes appear to conflict, they must be read "to give effect to each" if that can be done "while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259 (1981). This Court has also stated that when confronted with statutes that are "capable of co-existence, it is the duty of the *courts*, absent clearly expressed congressional intention to the con-

2. The court of appeals assumed that by exempting the subject transaction from the prior approval requirements of Section 11343, pursuant to Section 10505, the Commission effectively immunized the Railroads from compliance with the RLA, pursuant to Section 11341(a). App. A at 18a. As was discussed above, petitioner submits that this is a fundamentally erroneous interpretation of those provisions of the ICA. However, even if it is assumed that an exemption under Section 10505 could operate to relieve a carrier of its obligations under the RLA, the court of appeals' conclusion that the ICC, or an arbitrator acting pursuant to an ICC order, is the appropriate forum for resolving a conflict between the two statutes is not supported by the language of the ICA and is in conflict with decisions of this Court and other courts of appeals.

As petitioner has demonstrated, a Section 10505 exemption operates only to relieve a carrier of compliance with certain provisions of the ICA; it does not address the RLA or any other statute. Section 11341(a) does provide that the ICC's approval of a transaction relieves a carrier from compliance with anti-trust law and all other laws to the extent necessary to carry out the transaction, but it does not address which forum will make the determination that it is necessary to relieve the carrier of its obligation to comply with other law.[9] It is beyond dispute

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trary, to regard each as effective." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974) and *Morton v. Mancari*, 417 U.S. 535, 551 (1974); emphasis added. By concluding that the Section 10505 exemption nullified the Railroads' employees rights under the RLA, the court of appeals' decision is in conflict with the fundamental principle that such implied repeals are disfavored and that it is the courts, not the administrative agency charged with implementing one of the statutes, which are responsible for harmonizing the two statutes; or as a last resort, determining which of the two statutes will prevail.

[9] Rail labor has maintained that since 1976, an ICC rail consolidation order cannot operate to relieve a carrier of its RLA

that the district courts ordinarily have jurisdiction of complaints alleging violations of the RLA and that they have jurisdiction to interpret the ICA. In the absence of express language in either statute, the Court below erred in inferring that the Congress intended to remove disputes arising under the RLA from the jurisdiction of the district courts when those disputes arise out of transactions authorized under Section 11343. It is one thing for Congress to provide that the ICA may override other law in certain circumstances; it is quite another to conclude that Congress thereby also eliminated the jurisdiction of the district courts to interpret and enforce those statutes.

Additionally, the court of appeals' decision is premised upon the erroneous assumption that the ICC provides a forum for resolving any conflict between the ICA and the RLA; that the ICC considers the effects of the transaction on rights arising under other statutes and determines whether it is necessary that the carrier be relieved of compliance with that other law. However, it is now well-established that ICC orders under Section 11341 are self-executing. In *Schwabacher, supra*, this Court noted that under Section 5(11) of the ICA, [predecessor to Section 11341(a)], once the Commission is satisfied that a transaction is consistent with the policies of the ICA the exemption from compliance with other law is automatic. 334 U.S. at 194-195. *See also Brotherhood of Locomotive Engineers v. Chicago and North Western Ry. Co.*, 314

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obligations because in 1976, Congress amended what is now Section 11347 to provide that all consolidation orders must contain a condition which requires the carrier to preserve existing collective bargaining agreements and rights. Section 402(a) of Pub. L. No. 94-210, 90 Stat. 31; *see* 45 U.S.C. §§ 565(b)(1) and (2). Since a carrier is immunized under Section 11341(a) from all prohibiting or restraining laws which would prevent a carrier from effectuating a transaction as approved by the ICC and since all ICC orders must require a carrier to comply with the RLA, there can be no conflict between the ICA and RLA.

F.2d 424, 432 (8th Cir. 1963) and *Brotherhood of Locomotive Engineers v. Boston & Maine Corporation*, 788 F.2d 794, 801 (1st Cir. 1986). Thus, the ICC does not hold hearings or otherwise assess the extent of the conflict between the ICA and another statute, nor does it attempt to give effect to both statutes wherever possible and then, as a last resort determine which statute will control. Rather, the ICC merely determines whether a transaction is consistent with the policies of the ICA. And since the ICC's approval of a transaction automatically exempts a carrier from compliance with other law, an arbitration panel sitting pursuant to the ICC's order cannot possibly exercise discretion to determine whether the carrier may implement the subject transaction in a manner which will conflict with another law.

In the event that a carrier's implementation of a transaction creates such a conflict, it is for another forum, (*i.e.*, the district courts) to determine whether exemption of the carrier from compliance with that other law is necessary to effectuate the transaction. Indeed, that was the reasoning of the four justices who concurred in the decision in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, supra.* The concurring opinion noted that "Any tribunal that is faced with a claim that a party [to a transaction under Section 11343] is violating some other law has the responsibility of determining whether an exemption is necessary to carry out the transaction . . . ." 96 L. Ed. 2d at 247 n.13; citing *Railway Express Agency, Inc. Notes*, 348 I.C.C. 157, 215-218 (1975), in which the Commission stated that its authority to exempt transactions from the operation of antitrust laws did not include authority to interpret the antitrust laws themselves. Thus even if it is assumed that an exemption under Section 10505 could operate to immunize a carrier from compliance with the RLA, the court of appeals' conclusion that the ICC, and not the district court, has jurisdiction to decide whether such

immunity is appropriate is not supported by the language of the ICA and is in conflict with precedent of this Court and two other courts of appeals.[10]

3. In the ninety-nine years that Congress has been regulating rail labor relations, Congress has refused to compel arbitration regarding changes in collective bargaining agreements and working conditions. Indeed, Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." Also, Congress has concluded that in order to encourage compromise, which is inevitably necessary to reach an agreement, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining process. 45 U.S.C. §§ 152 Seventh, 155 First, and 156. Those status quo require-

[10] The court of appeals' conclusion that the Union's complaint constituted an impermissible collateral attack on the ICC's and/or the arbitrator's order was primarily based upon several decisions in which it was held that a district court or state court challenge to an administrative agency's decision was improper when the agency had developed a full record appropriate for appellate review and had actually addressed the issues raised in the district or state court. App. A at 12a-13a, citing *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1957); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979); and *Carey v. O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974). However, the point of those decisions was that the administrative agencies had jurisdiction to, and had actually addressed, and decided the issues raised in the district court and state court complaints. *See Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 641 (2d Cir. 1985)—("when the administrative agency is neither authorized nor required to decide the issue later raised in a separate action, the [district] court has jurisdiction to entertain the later claim." *Id.* at 642; citing *Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982)). That is precisely the situation presented in the instant case; the ICC is neither authorized nor required to decide the Union's RLA claims.

ments are, as this Court has stated, central to the design of this labor statute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1943) (footnote omitted).

Moreover, until recently (App. A at 19a n.27) the Commission had consistently rejected arguments by rail carriers that an exemption under what is now Section 11341 (a) in fact relieved them of their obligations under the RLA. Thus, in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696 (1958), the Commission stated that "Congress has not conferred upon us, the power to determine the disputes which are subject to the Railway Labor Act . . . ." *Id.* at 702. *See also, Southern Ry.—Control-Central of Ga. Ry.*, 331 I.C.C. 151 (1967) (Report on Remand). Indeed, as was noted above, in the instant case the ICC stated that it was not "the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights." App. A at 8a.

The decision of the court below, however, assumes that the ICC has the power to relieve a rail carrier of its RLA obligations and gives the ICC the right to determine if such an exemption is appropriate in this case. That result is contrary to the aforementioned long-standing precedents under both statutes. The result of the court of appeals' decision is that labor disputes arising from a rail carrier's implementation of an ICC approved transaction will be subject to binding arbitration under the auspices of the ICC. This changes almost a century of precedent in the rail industry where compulsory arbitration is expressly prohibited unless mandated by Congress in a few limited circumstances. *See e.g.*, Pub. L. No. 88-108 (1963); Pub. L. No. 91-226 (1970); Pub. L. No. 99-431 (1986). Furthermore, rail labor will no longer have access to the district courts to enforce the requirements of RLA when carriers seek to make changes in the status quo in connection with a transaction exempted from ICC regulation; rather the ICC will have authority (and may delegate that authority to an arbitrator) to determine whether a carrier is obliged to comply with existing collective bargaining agreements and with the status quo requirements of the RLA when it implements such a transaction. If this authority is delegated to an arbitrator, rail labor is not given an automatic right to even ICC review, since the review of arbitrators under ICC employee protective conditions is purely discretionary. *See, Chicago & North Western Transportation Company—Abandonment—Near Dubuque and Oelwein, Ia.*, 3 I.C.C. 2d 729 (1987).

This result is a radical departure from existing rail labor law which is dramatically effecting labor relations in the rail industry. Moreover, this result is plainly contrary to the underlying premise of the RLA. That voluntary resolution of rail labor disputes, channeled through the elaborate dispute resolution machinery of the RLA and subject to the RLA's status quo requirements, with its prohibition on resort to self-help pending completion

of RLA processes, is the best way of minimizing disruptions of this essential industry due to labor disputes. *Detroit and Toledo Shore Line Railroad Co., supra,* 396 U.S. at 148-150. If rail carriers and rail labor are to be subject to binding arbitration of disputes arising out of implementation of ICC approved transactions, and if the parties are to be deprived of the RLA's dispute resolution mechanisms and district court enforcement of those mechanisms, then it is likely that labor relations in the rail industry will return to the unsatisfactory situation which existed prior to the enactment of the RLA—before the RLA's recognition that labor peace is fostered only when the bargaining power of both labor and management is equal. Labor peace is *not* fostered by relegating labor to an administrative agency which rail labor believes protects the interests of management alone. *See* H.O. Wolf, THE RAILROAD LABOR BOARD, Chap. XV (University of Chicago Press, 1927).

While the decision of the court of appeals on its face appears to address only the proper forum to adjudicate rail labor's claims, its effect is clearly much broader. If rail labor is relegated to the ICC to enforce its Railway Labor Act rights as part of the ICC's public interest considerations, rail labor will effectively be deprived of its bargaining rights which are protected by that labor statute, for the RLA and the ICA regulate two entirely different areas of interstate commerce. *See, Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, supra,* 318 U.S. at 6. This is what is currently happening; since early 1986, as an example, rail carriers have used the automatic exemption from the prior approval requirements of 49 U.S.C. § 10901 [which was granted by the ICC in *Ex Parte No. 392 (Sub-No. 1)*, 1 I.C.C. 2d 810, *aff'd sub nom. Illinois Commerce Comm. v. ICC,* 817 F.2d 145 (D.C. Cir. 1987) (table)] in 79 cases as of September 8, 1987,[11] and, in most cases, the selling railroads

[11] These statistics are derived from the ICC's recent decision in *Ex Parte No. 392,* served October 2, 1987, calling for comments on

have contended that the ICC's jurisdiction over rail line sales has relieved them of any obligation under the RLA to bargain with rail labor over the impact of the sale on employees. *See* Complaint in *Railway Labor Executives' Assoc. v. Assoc. of American Railroads*, D.D.C. CA No. 87-2145. The instant case yields a comparable result because of the lower courts' decisions that it is the ICC which is to determine whether the ICA overrides the RLA. This overriding of the RLA, petitioner respectfully submits, can lead only to labor unrest.

Indeed, a strike regarding implementation of a transaction exempted from regulation recently occurred in Pittsburgh, Pennsylvania. The strike continued for three weeks until it was enjoined by the District Court for the Western District of Pennsylvania. However, in a recent decision *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R.*, (3rd Cir. No. 87-3664, Slip op., October 26, 1987) (App. H) the Court of Appeals for the Third Circuit held that under the Norris-LaGuardia Act (29 U.S.C. § 101, *et seq.*) the district court was without jurisdiction to issue such an injunction, and that the ICA does not override the anti-injunction policy of the Norris-Laguardia Act. App. H at 60a-63a. Accordingly, it is possible that the strike in Pittsburgh will resume.

The circumstances of that case clearly demonstrate the consequences of nullifying the dispute resolution mechanisms of the RLA in transactions exempted from regulation under the ICA by removing the district court as the forum for enforcement of those dispute resolution mechanisms. The Court below would seriously undermine the method chosen by Congress to achieve stability in labor relations in the rail industry. That mechanism which has worked so well for more than a half century should not be so lightly discarded as was done by the Court below.

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whether the regulation promulgating the class exemption should be revised.

Accordingly, the UTU submits that the Court should grant this petition so that it may consider the validity of the ruling of the court below which will have a devastating effect on rail labor relations.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: October 28, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5003

UNITED TRANSPORTATION UNION,
Appellant,

v.

NORFOLK AND WESTERN RAILWAY CO., *et al.*
Appellees.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 85-03410)

Argued February 13, 1987

Decided June 30, 1987

John O'B. Clarke, Jr., with whom *John J. Delaney* was on the brief, for appellant.

Jeffrey S. Berlin, with whom *Russell E. Pommer* and *William P. Stallsmith, Jr.* were on the brief, for appellees.

Before: WALD, *Chief Judge*, and SILBERMAN and D. H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* D. H. GINSBURG.

D. H. GINSBURG, *Circuit Judge*: The Interstate Commerce Commission ("Commission") imposes various la-

bor protective conditions when it approves, or exempts from prior approval, proposals by railroads to consolidate their operations. In this case, an arbitration panel resolved a dispute arising under such conditions, and the United Transportation Union ("UTU" or "the Union") brought a suit to challenge the award under the Railway Labor Act ("RLA").[1] The sole issue before us is whether the district court had subject matter jurisdiction over the Union's challenge. The district court dismissed the Union's action, reasoning that the arbitration award was either a final decision of the Commission, reviewable only by the court of appeals, or not final administrative action ripe for review. We hold that the arbitration panel's award was an order of the Commission, and conclude that therefore, regardless of whether it was final or non-final, the order is ultimately subject to the exclusive jurisdiction of the court of appeals. 28 U.S.C. §§ 2321(a),[2] 2342(5).[3] We therefore affirm the district court.

I. Labor Protective Conditions

Before turning to the facts of this case, we briefly describe the operation of labor protective conditions imposed by the Commission in railroad consolidations.

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[1] 45 U.S.C. § 151, *et seq.*

[2] 28 U.S.C. § 2321(a) provides:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or *order* of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title. (Emphasis added).

[3] The relevant portion of 28 U.S.C. § 2342 provides:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part, or to determine the validity of— . . . (5) all rules, regulations, or *final orders* of the Interstate Commerce Commission made reviewable by section 2321 of this title. (Emphasis added).

When two or more railroads wish to consolidate certain aspects of their operations, they must first satisfy various requirements imposed by the Interstate Commerce Act, as amended.[4] Carriers may, however, petition the Commission to exempt a proposed transaction from such requirements, pursuant to 49 U.S.C. § 10505. Subsection 10505(a) requires the Commission to grant an exemption when the application of such a provision:

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

Section 10505(g)(2), however, prohibits the Commission from exercising this exemption authority "to relieve a carrier of its obligation to protect the interests of employees as required by [the same] subtitle."[5]

In carrying out its statutory mandate to prescribe employee protective conditions, the Commission customarily imposes one or another of several sets of conditions, commonly referred to by the name of the case in which they were first adopted. In the case under review, the Commission applied the so-called *Mendocino Coast* and *Norfolk* and *Western* conditions.[6] *Mendocino Coast* provides

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[4] The requirements pertinent to this case are set forth in 49 U.S.C. §§ 11343 and 10901.

[5] Section 11347 sets out the employee protective obligations for rail carriers, such as appellees here, seeking an approval of, or exemption for, a proposal to merge or otherwise co-ordinate or consolidate their activities in a manner identified in section 11343. *See McGinness v. I.C.C.*, 662 F.2d 853 (D.C. Cir. 1981) (employee protective conditions of section 11347 apply to transactions exempted from approval by the Commission pursuant to section 10505, as well as to those for which a carrier seeks approval).

[6] The *Mendocino Coast* conditions derive from *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 I.C.C. 732

for full wages and benefits for dismissed employees for up to six years, and, for employees transferred to lower paying jobs, a displacement allowance equal to the difference between their prior and subsequent earnings. The *Norfolk and Western* conditions contain similar provisions.

Under both *Mendocino Coast* and *Norfolk and Western*, either the carrier or the union may ultimately call for arbitration if the two sides fail to conclude what is commonly termed an "implementing agreement." Article I, Section 4 of *Mendocino Coast* prescribes the procedure that must be followed before either party invokes arbitration. Under *Mendocino Coast*, a railroad must first give at least 20 days notice of its intention to lease or operate the properties of another rail carrier, 354 I.C.C. 732, 733; under *Norfolk and Western*, the same notice must be given when a railroad plans to acquire "trackage rights over, joint ownership in, or joint use of" lines operated by another railroad.[7] 354 I.C.C. 605, 610. Either side may then call for negotiations, which may last no more than 20 days. The conditions state:

> Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis [sic] accepted as appropriate for application in the particular case and any assignment of employees made necessary by the

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(1978), *modified*, 360 I.C.C. 653 (1980). The *Norfolk and Western* conditions derive from *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980). We affirmed both decisions *sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[7] Because there are no further differences between the *Mendocino Coast* and *Norfolk and Western* conditions material to this case, we refer to both hereinafter under the *"Mendocino Coast"* sobriquet.

transaction shall be made on the basis of an agreement or decision under this section 4.

If there is a failure to reach implementing agreement at the end of the negotiation period, the parties must select a neutral referee, or, if they cannot even agree on that, ask the National Mediation Board to appoint one. The referee must hold a hearing, and thereafter issue a "final, binding, and conclusive" decision.

II. Background

The appellees in this case are three railroads, all of which are direct or indirect subsidiaries of Norfolk Southern Corporation ("Norfolk Southern"). They are the Southern Railway Company ("Southern"), the Interstate Railroad Company ("Interstate"), a wholly owned subsidiary of Southern, and the Norfolk and Western Railway Company ("N&W"). Interstate is a small railroad, having less than 40 miles of main line and operating in the coal fields of southwestern Virginia. Its lines lie in between those of the Southern and the N&W, and serve to connect the other two railroads. The Interstate originates substantial amounts of coal traffic.

Because the carriers planned to integrate certain aspects of their operations, they petitioned the Commission for three exemptions—as more fully described below—from the prior review requirements normally applicable to railroad consolidations. Their intention was for the N&W and the Southern jointly to operate the Interstate's properties, with the N&W assuming responsibility for all of the Interstate's train operations. (The Southern's intended role is not entirely clear to us, but it is of no moment to our disposition of the case). The new arrangement would permit the carriers to take advantage of better grades and operating routes for traffic moving from Interstate origins to points on the N&W and Southern lines. The carriers also agreed to send future coal shipments originating on the eastern portion of the In-

terstate over N&W lines, rather than over Southern lines, in order to accommodate the intensive use of the Southern's lines that they anticipated as a result of an exchange of trackage rights between the Southern and an unaffiliated railroad.

All three exemptions were ultimately granted.[8] First, on February 19, 1985, the Commission exempted from the prior review requirements of 49 U.S.C. § 11343 the contract that allows the N&W and the Southern jointly to operate the Interstate's proprties.[9] Second, the Commission at the same time exempted from the prior review requirements of Section 10901 the N&W's proposal to conduct operations over an additional 2.3 miles of the Southern's line. Finally, several weeks later, the Commission granted the Interstate an exemption from the same provision, enabling that railroad to construct connecting tracks to the N&W's lines at both Norton and Tacoma, Virginia.

Pursuant to section 10505(g)(2), the Commission subjected the first exemption, for the N&W and the Southern to operate the Interstate's properties, to the *Mendocino Coast* conditions. It made the *Norfolk and Western* conditions applicable to employees affected by the N&W's acquisition of trackage rights over the Southern, as permitted under the second exemption. The Commission determined that employee protective conditions were not necessary, however, in connection with the third exemption, for the Interstate's track construction proposal.

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[8] *N&W, Southern and Interstate—Exemption—Control to Operate and Trackage Rights*, Finance Docket No. 30582.

[9] The Commission granted the exemption under 49 U.S.C. § 10505, pursuant to 49 C.F.R. § 1180.2(d)(3), which exempts as a class "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family."

In order to carry out these integrative transactions, the carriers deemed it necessary to reassign certain employees. Thus, for purposes of work assignments, they planned to integrate the Interstate's train and engine service employees with those performing similar duties on the N&W Pocahontas Division. A change of the employees' reporting site was also planned. Because of the operational difficulties that adherence to their existing collective bargaining agreements would entail, they also anticipated that the Interstate's 27 trainmen and conductors would become subject to the collective bargaining agreements between the N&W and the UTU.

Therefore, even before the Commission granted the exemptions and imposed employee protective conditions, the carriers notified the Union that the Norfolk Southern intended to "coordinate and or consolidate track and engine service, forces and seniority rosters on the Interstate and Norfolk and Western" lines, and called for the negotiation of an implementing agreement. Joint Appendix ("J.A.") at 59. Appellant railroads served this notice in accordance with Article I, Section 4 of the "*New York Dock*" labor protective conditions, anticipating that the Commission would grant the exemptions and impose those conditions.[10] There followed several days of negotiations between the Union and the carriers, which led to a tentative agreement. It was rejected by the 27 Interstate trainmen and conductors who would be affected, however, because they objected to being transferred to the N&W/UTU bargaining agreement, as provided for in the tentative agreement.

After the carriers' petitions for exemption were granted, the Norfolk Southern notified the UTU on

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[10] The *New York Dock* conditions derive from *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). In fact, the *Mendocino Coast* conditions, which the Commission did impose, are substantially similar.

March 27, 1985, of its desire to submit the matter to arbitration pursuant to Article I, Section 4 of the *Mendocino Coast* conditions. The UTU protested to the Commission that the railroads could not unilaterally compel the employees to submit major changes in their working conditions to arbitration. Under the RLA, the Union argued, the railroads could only effect changes in seniority and working conditions with the consent of the employees whose bargained-for rights would be affected. The Commission, however, declined to intercede, stating that "[n]o evidence has been presented to demonstrate that the involved railroads intend to abrogate the contractual or statutory rights of employees." Finance Docket No. 30582 (Sub-No. 1, April 1, 1985). The Commission then remarked:

> Although exemptions under 49 U.S.C. 10505 do not operate to relieve carriers of applicable laws and agreements relative to labor relations, this [exemption] proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

Id. at 44-45.[11]

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[11] The arbitrator later appointed in the proceedings below chided the Commission for "ducking its clear responsibility" to resolve the issue placed before it by the Union's petition. J.A. 31. Whether this be so or a canard, however, the ICC "has consistently refused to become involved in individual employee disputes arising under imposed employees protective conditions, deferring instead to arbitration for determination of causation issues and factual questions." *Chicago and North Western Transportation Company—Abandonment*, Docket No. AB-1 (Sub-Nos. 83 and 113), decision served April 28, 1987, slip op. at 3, *citing Brotherhood of Locomotive Engineers v. ICC*, No. 82-1944 (D.C. Cir. Jan. 9, 1987); *Walsh v. ICC*, 723 F.2d 570, 574 (7th Cir. 1983); *Bell v. Western Maryland Railroad Co.*, 366 ICC 64, 68 (1982). When the Commission was

Subsequently, the National Mediation Board appointed Robert J. Ables as the neutral referee. A representative of the carriers and of the Interstate employees also served as members of the "arbitration panel," but for all practical purposes the decision was in the hands of the referee, since the *Mendocino Coast* conditions provide that the "decision of the referee shall be final, binding, and conclusive . . . ." A principal issue in the arbitration was whether the panel had authority to transfer the employees to a new bargaining agreement without their consent.

On September 25, 1985, the neutral referee determined that the panel had jurisdiction under Section 4 of *Mendocino Coast* and issued an award. Referee Ables concluded:

> [T]he ICC can take all necessary action to authorize a consolidation, including protective conditions and procedures to resolve disputes on implementing agreements, including arbitration without deference to RLA collective bargaining rights.

Finance Docket No. 30582 (Sub-No. 1). He then granted the railroads authority to put into effect the terms of the proposed agreement rejected by the Interstate employees. The railroads notified the Union that the agreement would go into effect on November 1, 1985.

On October 25, 1985, the UTU filed a complaint in the district court alleging that the carriers' planned action would violate the major dispute procedures of the RLA.[12]

"for the first time . . . asked to review an arbitration decision awarding benefits under Commission-imposed employee protection conditions," it did so and established standards for its review of such arbitration awards. *Id.* at 6-7.

[12] The RLA has separate procedures for "major disputes," which relate to the formation of an initial collective bargaining agreement or an attempt by one of the parties to alter the terms of that agreement, and "minor disputes," which involve rights grounded

The court initially granted a temporary restraining order so as to maintain the status quo, but the order was dissolved on November 29, 1985, when the Union's motion for a preliminary injunction was denied. The court then dismissed the complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. The Union had properly presented its case as, and the court properly treated it as, a challenge to the arbitration award upholding the railroads' planned action. The court's ruling was based on alternative grounds:

> [I]f the Award as issued by the Panel is a "final order" of the Commission, it is reviewable only by the court of appeals under 28 U.S.C. §§ 2321(a) and 2342(5) . . . ; and, if it is not so characterized by the Commission, the Award is not an administrative decision presently ripe for judicial review.

United Transportation Union v. Norfolk and Western Railway Co., No. 85-3410, slip op. at 15 (D.D.C. Nov. 27, 1985). In discussing whether the award was final agency action, the court noted that the *Mendocino Coast* conditions provide that "[t]he decision of the referee shall be final, binding, and conclusive," *id.* at 16 (emphasis omitted), which certainly tended to suggest that the award was final agency action. The court went on to say, however, that if the Commission would not regard the award as final, "then the ripeness doctrine . . . or the doctrine of exhaustion would preclude judicial review at this time." [13] The appeal followed.

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in existing collective bargaining agreements. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-24 (1945). Major disputes are never subject to mandatory arbitration under the RLA, while minor disputes may be. *See infra* note 20.

[13] The District Court was prudent to consider alternate characterizations of the arbitral award. Without intimating any view on the merits of a case not before us, we note the Commission's recent decision in *Chicago and North Western Transportation Company—Abandonment, supra* note 11, asserting jurisdiction to review arbitration awards.

III. Discussion

A.

UTU contends first that the lower court had jurisdiction because the arbitral decision was not a final order of the Commission within the meaning of 28 U.S.C. § 2342. Alternatively, the Union argues that rights under the RLA can be vindicated in the district court even if doing so requires that an order of the Commission be challenged there. In either case, according to the Union, the district court had jurisdiction to decide the action under 28 U.S.C. §§ 1331 and 1337 because it concerns a violation of the mandatory negotiating requirements and other rights provided by the RLA and codified at 45 U.S.C. §§ 152, First and Seventh, and 156. The first two of these provisions require labor and management to "exert every reasonable effort" to settle disputes concerning rates of pay, rules, or working conditions,[14] and forbid carriers from changing rates of pay, rules, and working conditions without following the procedures of section 156.[15]

The last-cited provision, 45 U.S.C. § 156, provides that carriers or employee representatives who wish to propose

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[14] 45 U.S.C. § 152, First, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

[15] *Id.* § 152, Seventh, provides:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

changes in rates of pay, rules, or working conditions must notify the other side and negotiate the proposals. If the parties fail to reach agreement, they may invoke the services of the National Mediation Board to continue the negotiations.[16] If the Board determines that the parties have reached an impasse, it encourages them to submit the dispute to arbitration pursuant to section 157. Unlike arbitration under Commission-imposed employee protective conditions, however, arbitration under the RLA is entirely voluntary. If either party refuses to go to arbitration, the Board withdraws from the dispute and, after a 30-day cooling off period, the parties may resort to self-help.[17]

UTU's claim is, essentially, that the decision of the arbitration panel violated the RLA by transferring the 27 Interstate employees to a new bargaining agreement. This argument, however, goes to the merits. In light of the District Court's dismissal, our function is simply to determine whether the Union knocked on the wrong door in seeking judicial review of the arbitration award.

B.

It is beyond dispute that Congress "may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had." *City of Tacoma v. Taxpayers*, 357 U.S. 320, 336 (1957). In 28 U.S.C. § 2342, Congress conferred exclusive jurisdiction on the court of appeals "to enjoin, set aside, suspend (in whole or in part, or to determine the validity of . . . (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title." The UTU represents in its complaint that it initiated this action for the

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[16] *Id.* § 155, First.

[17] *See Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284, 291 (1963).

express purpose of "reviewing and setting aside" the arbitrator's decision. J.A. at 5. The crucial question, therefore, is whether the arbitral award was an order of the Commission. The answer depends upon the statutory authority for the arbitration mechanism.

Review of the statutory scheme leaves us with no doubt that the arbitral award must be treated as an order of the Commission. Under 49 U.S.C. § 10505(g)(2), the Commission must impose appropriate labor protective conditions, pursuant to section 11347, when it either approves a transaction or permits one to proceed exempt from the statutory approval requirements. When it exempted the Interstate transaction, the Commission imposed the *Mendocino Coast* conditions, and it is that Commission decision that exposed the Union to binding arbitration at the instance of the carriers. The arbitrator derives whether authority he has from that order of the Commission. The Union's challenge to the arbitral award is a challenge to the Commission's authority, through its delegate, to diminish rights said otherwise to be conferred by the RLA. Although the Commission did not expressly state that it delegated to the arbitrator authority to affect those rights, we think—as did the arbitrator—the delegation was necessarily implicit. The conclusion that the arbitral award, like the exemption award from which it derives, was functionally an "order of the Commission" within the meaning of 28 U.S.C. § 2321(a) is therefore inescapable. Accordingly, the district court lacked subject matter jurisdiction to entertain the challenge. The proper avenue of appeal is prescribed by 28 U.S.C. §§ 2321(a) and 2342(5), although immediate access to the avenue depends upon the further question whether the arbitral decision was a "final order" of the Commission within the meaning of 28 U.S.C. § 2324.

The Union's argument for jurisdiction below rests crucially on the proposition that it is asserting viola-

tions of the RLA rather than defects in an order of the Commission. For us to agree, however, would enable a party, merely by drafting an artfully worded complaint, to avoid the bar of a clearly applicable jurisdictional statute. The Union's complaint is with the Commission and the arbitration is set up. Its theory is that neither the Commission nor its arbitrator can lawfully issue an order that derogates the Union's rights under the RLA, not that they have somehow 'violated' the RLA. To view the matter otherwise would be to allow the complainant's own description of its theory to determine the forum with jurisdiction. In *City of Rochester v. Bond*,[18] we explicitly rejected the notion that the proper avenue of judicial review of agency action should depend upon the substantive infirmity alleged.

> The rationale for statutory review is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts. The choice of forum is, as we have said, for Congress and we cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged. The policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals. The likelihood of duplication and inconsistency would exist in either case.

Id. at 936.

While this Circuit has not previously passed on the proper course for the review of arbitral awards issued under conditions imposed by the Commission, we have rejected other attempts to short-circuit similar statutory review procedures. *Carey v. O'Donnell*,[19] for example, is

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[18] 603 F.2d 927 (D.C. Cir. 1979).

[19] 506 F.2d 107 (D.C. Cir. 1974).

closely on point. There we held that the district court lacked jurisdiction to entertain an attack by airline pilots on an integrated seniority list incorporated in a collective bargaining agreement by two merging airlines and approved the Civil Aeronautics Board ("CAB"). Like orders of the Commission, orders of the CAB were subject to the exclusive jurisdiction of the courts of appeals. 49 U.S.C. § 1486(d). We held that the actions in the district court, "although couched in terms of violations of the RLA and the [Age Discrimination in Employment Act of 1967], are essentially collateral attacks" on an order of the CAB. *Accord, Oling v. Air Line Pilots Association*, 346 F.2d 270 (7th Cir. 1965).

In a closely related context, the district court in *Lee v. St. Louis Southern Ry. Co.*, 633 F. Supp. 19 (E.D. Mo. 1986),[20] dismissed an action challenging the results of an arbitration conducted pursuant to labor protective conditions imposed by the Commission in approving a merger, where the "[p]laintiffs attempt[ed] to invoke the jurisdiction of [the District] Court pursuant to the [RLA]," specifically sections 153, First and Second.[21] The district court noted that the RLA sections relied upon by the plaintiffs established jurisdiction for appeals of National Railroad Adjustment Board ("NRAB") and

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[20] *App. docketed*, 8th Cir., No. 86-1516EM.

[21] "Minor disputes" may be initially submitted to one of three bodies under the RLA: the National Railroad Adjustment Board ("NRAB"), 45 U.S.C. § 153, First; "special boards of adjustment," *id.* § 153, Second, Second Paragraph.

The RLA explicitly provides for judicial review in the district court for the decisions of the NRAB and of public law boards. § 153, First (p); Second, Second Paragraph. The RLA is silent, however, as to whether district court review is available for the decisions of special boards of adjustment, See *Merchants Despatch Transportation Corp. v. Systems Federation*, 551 F.2d 144, 147-148 (7th Cir. 1977), and makes no reference whatever to arbitral decisions made pursuant to the labor protective provisions of the Interstate Commerce Act.

public law board decisions, but "do not apply to Arbitration Committee decisions made pursuant to Interstate Commerce Commission orders. Appeal of such decisions is governed by 28 U.S.C. § 2342(5)." *Id.* at 20.

The courts that have assented to district court review of arbitral awards rendered pursuant to Commission-imposed conditions have been obscure, when not altogether silent, on the question of jurisdiction. Thus, in *Anderson v. Norfolk & Western Ry.*, 773 F.2d 880 (7th Cir. 1985), the district court had granted summary judgment against a group of employees claiming that the arbitrator, appointed pursuant to the *New York Dock* conditions, exceeded his authority by supplanting his earlier award. The Seventh Circuit ordered the district court to dismiss the complaint for lack of jurisdiction because the plaintiffs lacked standing. It noted in passing that "the [district] court does have subject matter jurisdiction," 773 F.2d at 882, but it gave no further consideration to whether the action was properly commenced in the district court or lay within the exclusive jurisdiction of the court of appeals.

Similarly, in *Armstrong Lodge No. 762 v. Union Pacific R.R.*, 783 F.2d 131 (8th Cir. 1986), the Eighth Circuit affirmed a decision in which a district court reviewed an arbitration award, also rendered pursuant to the *New York Dock* conditions. A local union claimed that the arbitrator exceeded the scope of his authority and that the international union breached its duty of fair representation. The district court rejected both claims, relying on the view that the limited standard of review applicable to arbitration awards of the NRAB also applied to the arbitrator's decision under the *New York Dock* conditions. On review, the Eighth Circuit affirmed, but the question of the district court's jurisdiction was apparently never raised in the circuit court, and the district court opinion being unpublished, we have no indication that it was argued below. While the Seventh and

Eighth Circuit cases may thus be distinguished, insofar as they suggest a result different than the one we reach today, we simply find them unpersuasive.[22] They could hardly be persuasive, however, on an issue that, even if mentioned, was not discussed.

The Union argues that an arbitral award under the *Mendocino Coast* conditions is comparable to a decision of a special board of adjustment acting pursuant to 45 U.S.C. § 153, Second, First Paragraph, and that it is therefore subject to district court review. Congress was silent as to the procedure for review of adjustment board awards, *see supra* note 21, but two circuit courts have allowed challenges to such decisions to proceed in district court. *Merchants Despatch Transportation Corp. v. Systems Federation*, 551 F.2d 144 (7th Cir. 1977); *Employees Protective Ass'n v. Norfolk & Western Ry.*, 511 F.2d 1040 (4th Cir. 1975).

We have no occasion to disagree with those decisions because we find the analogy inapposite. In both cases, the courts found it significant that special boards of adjustment are creatures of the RLA. They thought that decisions of special boards should be reviewed in the same way that other arbitral awards made pursuant to the RLA are reviewed. We express no view on that question; we may assume that those decisions are correct. For present purposes, we need only note that the Ables award is directly traceable to labor protective conditions imposed by the Commission in carrying out its responsibility under the Interstate Commerce Act. It does not

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[22] *See also Brotherhood of Locomotive Engineers v. New York Doc. R.R.*, 94 CCH Lab. Cas. 21,826, 21,829 (E.D.N.Y. 1981) (awards of arbitration boards established pursuant to labor protective conditions are subject to review in federal district court pursuant to 28 U.S.C. §§ 1331 and 1337 because such "[c]onditions represent a federal contract which is governed by federal law." The parties in this case apparently did not argue, and the court did not address, the exclusive jurisdiction of the court of appeals to review final orders of the Commission.

derive its vitality in any part from the RLA and there is no particular reason to suggest that it should be reviewed like a decision of a special board constituted pursuant to the RLA. It is true that resolution of the issues raised by the Union's challenge to the arbitrator's award may, like a challenge to a special board decision, affect rights claimed under the RLA. But it may affect rights claimed under other statutes as well; that is neither here nor there in determining whether judicial review is available. The key facts are the source of authority for the award—here the Interstate Commerce Act—and the way in which Congress has specified that orders exercising that particular authority are to be reviewed.[23]

The UTU also advances the curious proposition that the Ables award cannot be considered an order of the Commission because "the ICC never had jurisdiction to address the RLA issues raised in the Award because the ICC only acted within the context of an exemption proceeding, which does not operate to relieve carriers of their obligations under the RLA."[24] The Union argues that an exemption proceeding "simply means that the Commission considers the transaction proposed by the carriers to be so insignificant that it need not be reviewed by the Commission."[25] In the Union's view, the Ables award was "the product of an independent arbitrator subject to review in federal district courts pursuant to the RLA."[26]

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[23] The court in *Merchants Despatch* also weighed the need for a federal forum, rather than a state forum, for review of special board awards, in the interest in uniformity. Here, there is no need for concern about the Union's claims being remitted to state court, since review of final Commission orders by the federal courts of appeal is assured.

[24] Brief of Appellant at 13.

[25] *Id.*

[26] *Id.* at 14.

We must reject these contentions. The requirement of the Interstate Commerce Act that the Commission impose labor protective conditions when it exempts a transaction from prior review merely substitutes one form of continuing Commission oversight for another. The exemption implies neither that the transaction should be treated as though it had not been subject to regulation *ab initio*, nor that the arbitral regime substituted for the Commission's prior review of transactions is independent of the source of its statutory authority, *viz.* the Interstate Commerce Act.

Finally, the Union contends that even if the Commission did have jurisdiction at one time, it abdicated that jurisdiction by declining to address the Union's protests before the dispute was submitted to arbitration. The district court rejected this contention, concluding that the Commission was merely deferring any pronouncement about the relationship between the *Mendocino Coast* conditions and the RLA until Referee Ables had addressed the issue.[27] We need not characterize the Com-

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[27] Recently, in *Brotherhood of Locomotive Engineers v. ICC*, No. 82-1944, slip op. (D.C. Cir. Jan. 9, 1987), we held that the Commission properly dismissed a complaint by a union on the ground that arbitration was the exclusive means of resolving a dispute arising under the *Norfolk and Western* conditions. The Commission has now expressed its further view that it may review such an arbitral award. *See supra* note 13.

In addition, the Commission has in dictum anticipated the probable outcome of any future review by it of the arbitral decision that the UTU seeks to attack here. *See Maine Central R.R., et al. —Exemption*, decision served September 13, 1985, Finance Docket No. 30532, *affirmed sub nom., Railway Labor Executives' Ass'n v. ICC*, No. 85-1636 (D.C. Cir. March 16, 1987). In *Maine Central*, the Commission rejected the UTU's argument that the Washington Job Protection Agreement, an industry-wide contractual set of employee protective conditions, could be invoked to trump the *Mendocino Coast* conditions. In so holding, the Commission stated that an argument based on the RLA rather than that Agreement would also fail, because "[t]he provisions of RLA are subsumed in the conditions imposed by the Commission." Finance Docket No. 30532.

mission's statement, however, for even if appellant's position were accurate, the result would only be that the Ables award would more probably amount to final agency action, not that jurisdiction would lie in the district court.

For these reasons set forth herein, the dismissal of the action by the district court for lack of subject matter jurisdiction is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 85-3410

UNITED TRANSPORTATION UNION,
Plaintiff

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
SOUTHERN RAILWAY COMPANY, and
INTERSTATE RAILROAD COMPANY,
Defendants

[Filed Nov. 29, 1985]

MEMORANDUM OPINION AND ORDER

United Transportation Union ("UTU") filed a complaint for declaratory and injunctive relief with this Court on October 25, 1985. The complaint sought review and the setting aside of an arbitration award ("the Award") issued on September 25, 1985, in favor of the defendants, Norfolk and Western Railway Company ("N & W"), Southern Railway Company ("Southern") and Interstate Railroad Company ("Interstate"). A three-member Arbitration Panel ("the Panel"),[1] selected by the National Mediation Board ("NMB") in response to a petition of the defendants and an Interstate Com-

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[1] The Panel consisted of the following people: a Neutral Referee, Robert J. Ables; the Director of Public Relations for Southern, David N. Ray; and the Vice President of UTU, L.W. Swert. Mr. Swert objected to the Award, and filed a dissenting opinion.

merce Commission ("ICC" or "the ICC") notice, had issued the Award. The Award authorized the November 1, 1985 effectuation of an April 17, 1985 document that was designed to implement three ICC-approved consolidation proposals [2] of the defendants. The Panel had characterized said document as a tentative implementing agreement reached by the parties after considerable arbitration. UTU had, however, objected to the arbitration proceedings from their inception, and presently controverts the ICC's characterization. In its complaint, UTU contends that, by forcing UTU to arbitrate and by abrogating certain employee protective conditions of twenty-seven UTU members during said arbitration, the defendants have violated several provisions of the Railway Labor Act ("RLA" or "the RLA"), 45 U.S.C. § 151, *et seq.* As a result, UTU argues that the Award must be declared invalid and set aside.

The Court granted UTU's application for a temporary restraining order on October 31, 1985, after conducting a hearing in which counsel for the defendants participated fully. That order enjoined the defendants from placing into effect the controversial implementing agreement until the Court could conduct a hearing on UTU's motion for a preliminary injunction on November 14, 1985. In response to a subsequent request of the parties, the Court continued said hearing and extended the temporary restraining order until November 21, 1985, so that the parties could properly brief the numerous legal issues involved in this case.

At the preliminary injunction hearing, the Court focused chiefly on the motion of defendants to dismiss the complaint as to Southern for lack of subject matter jurisdiction.[3] In addition, the Court addressed defendants'

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[2] Finance Docket No. 30582.

[3] In the alternative, defendants moved to dismiss the complaint as to Southern for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(6)(2).

motion as to both N & W and Interstate for lack of personal jurisdiction and for improper venue. Finally, the Court questioned counsel for the parties briefly about the merits of UTU's motion for a preliminary injunction: in particular, counsel were required to discuss the likelihood of UTU's success on the merits of the case.

After obtaining the consent of the parties to extend the temporary restraining order until it could render a memorandum opinion and order, the Court took the matter under advisement. Having evaluated the substantial papers filed and lengthy argument conducted in this case, the Court has concluded that it several respects it lacks subject matter jurisdiction and in other respects it would be inappropriate to address UTU's complaint as to *all* of the defendants. The complaint must therefore be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[4] Accordingly, the Court declines to comment on the issues of in personam jurisdiction and venue where N & W and Interstate are concerned, and will not address the merits of UTU's preliminary injunction motion.

Factual Background

UTU is an unincorporated labor organization. It is a "representative" as that term is used in the RLA, 45 U.S.C. § 151, *et seq.*

Defendant N & W is a Virginia corporation engaged in the transportation of property and goods by mail in interstate commerce; and, as such, N & W is a "carrier" within the meaning of the RLA and a "common carrier" subject to the Interstate Commerce Act ("ICA" or "the ICA"), 49 U.S.C. § 10101, *et seq.* Defendant Southern is a corporation, whose state of incorporation has not

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[4] Although defendants have moved to dismiss the complaint as to Southern only, the Court must dismiss the complaint *in toto* when it "*appears* . . . that the court lacks jurisdiction over the subject matter." Fed. R. Civ. P. 12(h)(3) (emphasis added).

been made clear to the Court,[5] engaged in the transportation of property and goods by mail in interstate commerce; and, as such, it is also a carrier and common carrier subject, respectively, to the RLA and the ICA.

Defendant Interstate, twenty-seven of whose employees will allegedly be injured by the implementation agreement in question, is incorporated in Virginia. In addition, it is a wholly-owned subsidiary of Southern, and is also subject to both the RLA and the ICA. All three defendants are controlled by Norfolk Southern Corporation ("NSC"), whose state of incorporation is not known by the Court.[6]

As a result of an earlier transaction approved of by the ICC in *Norfolk Southern Corp.—Control—Norfolk & W Ry. Co.*, 366 I.C.C. 171 (1982), N & W, Southern, and Interstate were consolidated as "mechanical services." On November 5, 1984, N & W and Southern petitioned ICC (Finance Docket No. 30582) for an exemption under 49 U.S.C. § 10505 ("Authority to exempt rail carrier transportation")[7] from the prior review requirements of 49 U.S.C. § 11343 ("Consolidation, merger, and acquisition of control"), to enable N & W to operate under contract the properties of Interstate. Concurrently, Interstate sought a similar exemption from the prior review requirements of 49 U.S.C. § 10901 ("Authorizing construction

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[5] Southern has conceded, however, that it does business in the District of Columbia.

[6] Defendants concede, however, that NSC does business in the District of Columbia.

[7] 49 U.S.C. § 10505(a) provides in pertinent part: [the ICC] shall exempt . . . a transaction or service because of the limited scope of the transaction or service, *when the . . . [ICC] finds that the application of a provision of this subtitle—(1) is not necessary* to carry out the transportation policy of . . . [49 U.S.C. § 10101]." (Emphasis added). 49 U.S.C. § 10505(g) provides in pertinent part: "[the ICC] may not exercise its authority under this section . . . (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle."

and operation of railroad lines"), so that it could construct "connecting tracks at Norton and Tacoma, Virginia"; and, finally, N & W sought an exemption from the same provision in order to conduct N & W operations over an additional 2.3 miles of Southern's lines in southwestern Virginia.

UTU contends that, in their three-exemption petition, the defendants "stated in detail the manner in which they proposed to effectuate their contemplated transaction, *including their intentions to alter seniority rights and to unilaterally* [*sic*] *select the forces to perform certain operations.*" *Complaint*, at 4 (emphasis added). Thus, in response to the defendants' petition, UTU, and the Railway Labor Executives' Association ("RLEA"), filed a letter of protest with the ICC.

In mid-January, 1985, the defendants notified various UTU representatives of the carriers' respective employees that NSC, the parent corporation, intended to "coordinate and/or consolidate track and engine service, forces and seniority rosters on the Interstate and . . . [N & W]" in connection with the November 5, 1984 exemptions petition pending before the ICC. This notice was served on UTU pursuant to Article I, Section 4 of the employee protective conditions set forth in *New York Dock Ry.—Control*, 360 I.C.C. 60, *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). *See infra* note 8 and p. 9. Reluctantly, UTU participated in negotiations with the defendants during late January, late February, and mid-April of 1985. Although the Panel would later characterize an April 17, 1985 document as a "tentative implementing agreement," UTU maintains that "[t]hese conferences failed to produce an implementing agreement acceptable to all the parties." *Complaint*, at 5.

Meanwhile, on February 19, 1985, ICC issued a "Notice of Exemption" under 49 U.S.C. § 10505 that exempted from prior ICC review the "contract to operate" and "acquisition of trackage rights" proposals petitioned for

by the respective defendants in November of 1984. In its decision ICC stated that the exemptions were warranted, because N & W, Southern, and Interstate were already members of the same corporate family (*i.e.*, that of NSC), so that the approved transactions would not result in changes in service levels significant operational changes, or a change in the competitive balance with carriers outside the corporate family. *See* 49 U.S.C. § 10101; 49 C.F.R. § 1180.2(d)(3). ICC's exemption order required, however, as follows:

> As a condition to use of this exemption, *any employees affected* by N & W-Southern contract to operate the properties of Interstate will be protected pursuant to *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980). *Any employees affected* by N & W's acquisition of trackage rights over Southern will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast, supra*, 360 I.C.C. 653 (1980). Together these conditions satisfy the statutory requirements of 49 U.S.C. § 10505(g)(2).[8]

(Emphasis added) (footnote added). On March 8, 1985, the ICC, under 49 U.S.C. § 10505, exempted from the prior review requirements of 49 U.S.C. § 10901 the defendants' track construction proposal petitioned for in November of 1984 this time finding that the imposition of employee protective conditions would not be necessary. Thus, all three exemptions petitioned for by the defendants were granted.

Hours after ICC had issued its February 19 order, but several days before ICC had served the same on UTU,

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[8] *See supra*, note 7. The "*Mendocino Coast*" and "*New York Dock*" (*see supra*, p. 6) conditions are virtually the same. *See infra*, discussion, p. 9.

UTU submitted, again with RLEA, "Supplemental Comments" to its earlier letter of protest. The comments of UTU and RLEA noted

> that the railroads intend to (1) consolidate seniority rosters of Interstate train and engine service employees with similar rosters of N & W's Pocahontas Division, with the result that N & W employees on the consolidated roster will perform work on Interstate; (2) transfer Interstate train dispatching work to the N & W; (3) abolish four Interstate train dispatching positions; and (4) allow N & W employees to perform maintenance-of-way on Interstate which is now being performed by employees of Southern.

In addition, the comments contended that, although "the railroads may ask the affected employees to agree to these changes in their seniority and working conditions . . ., *the railroads cannot unilaterally impose the changes or require the employees to arbitrate changes in the existing labor agreements.*" (Emphasis added). ICC considered UTU's challenges to the exemptions in its "Notice to the Parties," dated April 1, 1985. ICC concluded therein that "[n]o evidence has been presented to demonstrate that the involved railroads intend to abrogate the contractual or statutory rights of employees." ICC then reserved a determination of the issue, by stating as follows:

> Although exemptions under 49 U.S.C. [§] 10505 do not operate to relieve carriers of applicable laws and agreements relative to labor relations, *this [exemption] proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes. . . .*

On April 26, 1985 the defendants notified UTU of the former's desire to submit the matter to arbitration pursuant to Article I, Section 4 of the *Mendocino Coast* condi-

tions,[9] which provides that, when the parties have failed to reach an agreement through negotiation as to

> a dismissal or displacement of employees or rearrangement of forces . . ., the negotiations shall terminate and either party to the dispute may submit it for adjustment in accordance with the following procedures:
>
> (a) Within five (5) days from the termination of negotiations, the parties shall select a neutral referee and *in the event they are unable to agree within said five (5) days upon the selection of said referee, the National Mediation Board* ["*NMB*" *or* "*the NMB*"] *shall immediately appoint a referee.*
>
> *(b) No later than twenty (20) days after a referee has been designated a hearing on the* dispute shall commence.
>
> (c) *The decision of the referee shall be final, binding, and conclusive* and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute . . . .

(Emphasis added). UTU objected to the compelled arbitration. Accordingly, when NMB appointed Robert J. Ables as neutral referee on June 13, 1985, said appointment was made "[o]ver the jurisdictional objection of . . . UTU . . . ." *Complaint*, at 5.[10]

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[9] *See supra* note 8.

[10] UTU argues that Article I, Section 4 of the *Mendocino Coast* conditions are directly contrary to Article I, Section 2 of the same conditions, the latter of which provides as follows:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of employees under applicable laws and/or existing collective bargaining agreements or otherwise *shall be preserved unless changed by future collective bargaining agreements or applicable statutes.*

(Emphasis added). In addition, UTU contends that, under 45 U.S.C. § 157, UTU had "an absolute right to refuse such a request

On September 25, 1985, after conducting an arbitration hearing, evaluating both pre- and post-hearing briefs, and finding that the Panel had jurisdiction under Article I, Section 4, of the *Mendocino Coast* conditions, *supra*, the Panel issued the Award (UTU's L.W. Swert dissenting). Referee Ables determined that the "Carriers . . . [were] authorized to put into effect the tentative implementing agreement of the parties, dated April 17, 1985." Defendants notified UTU shortly after the Award was issued that it planned to put the agreement into effect on November 1, 1985.

UTU filed its complaint with this Court on October 25, 1985, alleging that on November 1 the defendants "intend[ed] to alter seniority and to [sic] unilaterally select employees to perform operations in connection with defendants petition for exemptions filed with the ICC on November 5, 1984 . . . ." *Complaint*, at 7-8. UTU contended that such action by defendants would violate the rights of UTU members, employed by Interstate, under the RLA and collective bargaining agreements. *Id.* at 8. UTU maintains that, under 45 U.S.C. § 157, defendants could only "request . . . UTU to arbitrate any dispute over proposed changes to existing rates of pay, rules, or working conditions, but that . . . [UTU] has an absolute right to refuse such a request. . . ." *Id.* at 7. Thus, UTU seeks declaratory judgment, under 28 U.S.C. §§ 2201 and 2202, from this Court that the *defendants* (vis-a-vis the ICC) have violated 45 U.S.C. §§ 152, 156, and 157 (under the RLA) "by requiring plaintiff to arbitrate proposed changes to existing rules and working conditions." *Id.* at 8. In addition, UTU requests that the Court preliminarily and permanently enjoin the defendants

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to arbitrate . . . ." *Complaint*, at 7. That provision provides in pertinent part that "the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." *See infra*, discussion, pp. 10-11.

> from failing or refusing to participate in negotiations over the desired changes in existing collective bargaining agreements as required by . . . [the RLA], 45 U.S.C. 151, *et seq.*, by not abrogating or refusing to apply to [the twenty-seven] Interstate-UTU employees, the UTU-Interstate rules and working conditions until defendants have complied with Section 6 of . . . [RLA], 45 U.S.C. § 156 ["Procedure in changing rates of pay, rules, and working conditions"].[11]

(Footnote added.)

DISCUSSION

Subject Matter Jurisdiction

"It is the burden of the party claiming subject matter jurisdiction to demonstrate that it exists." *Georgiades v. Martin-Trigona*, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984). *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). In a non-diversity context, the Court has "subject matter jurisdiction over cases that involve the violation of some federal law: the Constitution, a statute, or an agency regulation." *Orlowski v. Massachusetts Rehabilitation Comm'n*, 585 F. Supp. 1408, 1409. In addition, "[i]t is up to the plaintiff in a federal case to point this law out; otherwise the Court is powerless to act. . . . It is not enough for . . . [the plaintiff] to say he has been wronged; he must point to the laws that give the federal court the power to act in his case." *Id.* Moreover, only in an exceptional case should a federal court defer the resolution of a jurisdictional issue in fa-

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[11] In addition, UTU seeks an order that would "make whole all of their employees who are adversely affected . . ." by the defendants' alleged failure to comply with the RLA, and "other further relief as this Court may deem to be just and proper. . . ." Given the Court's resolution of the case on subject matter jurisdiction and judicial propriety grounds, it need not address these additional relief requests.

vor of a decision on the merits. *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1101 (D.C. Cir. 1985). Otherwise, a federal court must be "fastidious about the impropriety of reaching merits issues without first establishing jurisdiction. . . ." *Beattie v. United States*, 756 F.2d 91, 126-27 (D.C. Cir. 1984) (Scalia, J., dissenting, opinion filed Feb. 26, 1985).

In the present case, UTU contended originally that this Court was vested with subject matter jurisdiction to evaluate the merits of the instant case, "by virtue of 28 U.S.C. §§ 1331 ["Federal question"] and 1337 ["Commerce and antitrust regulations . . ."], and 45 U.S.C. § 153 ["National Railroad Adjustment Board"] to issue the [declaratory and injunctive] relief requested herein under 28 U.S.C. §§ 2201 and 2202." *Complaint*, at 2.

In its response to the defendants' motion to dismiss for lack of subject matter jurisdiction (*"Response"*), UTU abandoned its claim for federal question jurisdiction by relying solely on the proposition that "this case is one arising under two Acts of Congress which regulate interstate commerce—*i.e.*, the Interstate Commerce Act . . . and the Railway Labor Act . . .—and thus within this Court's subject matter jurisdiction under 28 U.S.C. § 1337." *Response*, at 5.[12]

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[12] Defendants note correctly that, in its search for subject matter jurisdiction, UTU has, in effect, attempted to amend its complaint by bolstering its Section 1337 (commerce laws) assertion with a new allegation concerning violations of the ICA. *See Reply Memorandum of Defendants in Support of their Motions to Dismiss* (*"Reply"*) at 18. UTU's quest for jurisdiction would proceed one step further: less than an hour before the Court conducted its hearing on UTU's motion for a preliminary injunction, UTU filed a motion to amend its complaint. The proposed version of the complaint cited still another ground for jurisdiction: 28 U.S.C. § 1336(a) ("Interstate Commerce Commission's orders"). *Amended Complaint*, at 2. UTU asserted therein that this action was being "brought to enforce the commands . . . of the [February 19, 1985 "Notice of Exemption"] order of the Interstate Commerce Com-

It is clear that UTU has failed to demonstrate a specific statutory basis under the RLA for subject matter jurisdiction, even though UTU relied on 45 U.S.C. § 153(q) in its original complaint: UTU is not petitioning this Court to review an "order" or "award" of the first division of the National Railroad Adjustment Board ("NRAB"). The action or actions challenged by UTU were obviously taken by ICC, NMB, and the Panel that issued the Award in question. In fact, counsel for UTU conceded during the November 21 preliminary injunction hearing that in the original complaint he had attempted in vain "to fit a square peg into a round hole." Likewise, as defendants point out, UTU has failed to identify a specific statutory provision within the ICA that confers subject matter jurisdiction upon this Court to evaluate the Panel's Award. *See Reply*, at 19. *See also supra* note 12.

Thus, UTU's complaint boils down to a potential action for declaratory and injunctive relief, which concerns alleged abrogations of several employee protective provisions strewn throughout the RLA and the ICA. In such

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mission . . . ." *Id.* at 1. However, Section 1336(a) grants jurisdiction to the district courts only over "any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission . . . *for the payment of money or the collection of fines, penalties, and forfeitures.*" (Emphasis added). The exemption order in question cannot be properly characterized under this provision: where a plaintiff challenges an ICC order that does not concern "the payment of money or the collection of fines, penalties and forfeitures," the order may be challenged only in the court of appeals under 28 U.S.C. §§ 2321(a) and 2342(5). *See, e.g.*, State of Illinois, Dep't of Public Aid v. Schweiker, 707 F.2d 273, 276 (7th Cir. 1983) (district court appropriate forum); City of New Orleans v. Southern Scrap Metal Co., Ltd., 704 F.2d 755, 761 (5th Cir. 1983) (same); Pullman Standard, A Division of Pullman, Inc. v. ICC, 705 F.2d 875, 878-79 (7th Cir. 1983) (circuit court appropriate forum; Sections 1336(a) and 2321(a) "mutually exclusive"). Thus, plaintiff's Section 1336(a) argument is not only a late arrival—it missed the appropriate runway as well.

a case, "*Gully v. First National Bank*, 229 U.S. 109 . . . [(1936)], prescribes the rules to be applied in determining whether an action arises [for purposes of 28 U.S.C. § 1337] under the provisions of the Interstate Commerce Act or the Railway Labor Act." *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co.*, 314 F.2d 424, 428 (8th Cir.), *aff'g*, 202 F. Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963): "Gully . . . states the test of jurisdiction: 'The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.'" *Id.* (quoting *Gully*, 299 U.S. at 112).

At this juncture, however, the Court need not address the Section 1337 characterization issue. Rather, it concludes that, whether or not UTU has made out a subject matter jurisdiction basis for a "civil action or proceeding arising under any Act of Congress regulating commerce . . .," judicial review of the Award is not appropriate for alternative reasons: if the Award as issued by the Panel is a "final order" of the ICC, it is reviewable only by the court of appeals under 28 U.S.C. §§ 2321(a) and 2342(5), *see supra* note 12; and, if it is not so characterized by the ICC, the Award is not an administrative decision presently ripe for judicial review. *See Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 246 ("declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for an initial decision to an administrative body").

Final Order or Ripeness and Exhaustion

When it reserved its determination of the issue concerning "applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes, *see supra* p. 8, the ICC apparently referred, *sub silentio*, said determination to the Panel. *See In Re Norfolk and Western Railway*,

slip op., at 15 (Ables, Arb., decision filed September 25, 1985): "If the . . . [ICC] meant that the appropriate forum was the courts, it was ducking . . . [its] responsibilities . . . . There is no need for this arbitration panel to duck."

Under Article I, Section 4(c), of the *Mendocino Coast* conditions imposed on the defendants by the ICC in its February 19, 1985 exemption order, "*The decision of the referee shall be final, binding, and conclusive . . . .*" (Emphasis added). Thus, it seems that the ICC delegated its final order-making authority to the Panel, and that the resulting Award would therefore be appealable only to the United States Court of Appeals for the District of Columbia Circuit. *See* 28 U.S.C. § 2342(5) (court of appeals has "exclusive jurisdiction" to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of ICC).[13]

It would therefore be the responsibility of the circuit court to determine whether the exemption procedure designed and utilized by the ICC in this case comports with the standard established in *Brotherhood of Locomotive Engineers ("BLE") v. ICC*, 761 F.2d 714, 724-25 (D.C. Cir. 1985) (Wright, J.), that in granting consolidation-related exemptions under the ICA while waiving employee protective provisions of the RLA, the ICC exceeds its authority unless it makes an evidentiary determination that waiver is "necessary to effectuate the transactions at issue." [14]

If it is the ICC's policy not to consider such an award a final order, then the ripeness doctrine, *see Friends of*

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[13] UTU represented during the preliminary injunction hearing that such awards were considered to be final ICC orders; in addition, UTU acknowledged that an informal agency procedure existed whereby aggrieved parties could request a clarification of the legal status of such award from the ICC.

[14] BLE post-dated the exemption orders at issue here.

Hop Marketing Order v. Block, 753 F.2d 777, 778 (9th Cir. 1985) (per curiam), or the doctrine of exhaustion would preclude judicial review at this time. *See McKart v. United States*, 395 U.S. 185, 193-95 (1969).

In any event, under either the final order or ripeness/exhaustion analysis, it is not for this Court to determine the merits of UTU's purported RLA and ICA claims for declaratory and injunctive relief under Section 1337. *See Telecommunications Research and Action Center ("TRAC") v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) and *Air Line Pilots Association, International ("ALPA") v. CAB*, 750 F.2d 81 (D.C. Cir. 1984) (where 28 U.S.C. § 2342 commits review of final agency action to court of appeals, any suit seeking relief that might affect that court's future jurisdiction is subject to its exclusive review). Thus, the appropriate remedy for this case is dismissal of the complaint. *See Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 631 (9th Cir. 1985) (complaint seeking district court review under Pacific Northwest Electric Power and Planning Act, 16 U.S.C. § 839, *et seq.*, dismissed).[15]

In accordance with this opinion, an order denying UTU's motion for a preliminary injunction and dismissing UTU's complaint for lack of subject matter jurisdiction shall be issued contemporaneously herewith.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

Dated: November 27th, 1985

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[15] If, on the other hand, the Award at issue were unquestionably a final ICC order, the Court would not be compelled to order dismissal. Rather, it could exercise its option to transfer the case to the circuit pursuant to 28 U.S.C. § 1631. *See* TRAC, 750 F.2d at 79 n.37.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-3410

UNITED TRANSPORTATION UNION,
Plaintiff

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Defendants

[Filed Nov. 29, 1985]

ORDER OF DISMISSAL

In consideration of United Transportation Union's motion for a preliminary injunction, the defendants' motions to dismiss, the oral argument held, the entire record herein, and in accordance with the Court's memorandum opinion issued contemporaneously herewith, it is this 27th day of November, 1985, hereby

ORDERED that said motion for preliminary injunction is denied; and it is

FURTHER ORDERED that the complaint in the above-captioned action is dismissed pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure; and it is

FURTHER ORDERED that the Temporary Restraining Order issued by the Court on October 31, 1985 shall be and is hereby no longer in effect.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30582 (Sub-No. 1)

SERVICE DATE FEB. 25, 1985

NORFOLK AND WESTERN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND INTERSTATE RAILROAD COMPANY—EXEMPTION—CONTRACT TO OPERATE AND TRACKAGE RIGHTS

NOTICE OF EXEMPTION [1]

Norfolk and Western Railway Company (N&W), Southern Railway Company (Southern), and Interstate Railroad Company (Interstate) are controlled by Norfolk Southern Corporation. See *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 171 (1982). As a result of the transaction authorized in *Norfolk Southern, supra*, numerous functions of N&W, Southern and Interstate have been consolidated, such as mechanical services. Now, to take advantage of better grades and operating routes for coal traffic moving from origins in southwestern Virginia on the lines of Interstate to points

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[1] The parties filed a petition for exemption that was assigned Finance Docket No. 30582. However, when a specific transaction falls within the scope of 49 C.F.R. 1180.2(d), it too is exempt. See *Railroad Consolidation Procedures*, 366 I.C.C. 200, 203 (1980). Accordingly, to the extent the petition relates to the transportations described here, it is treated as a notice of exemption. Separate action will be taken in Finance Docket No. 30582 to the extent the petition involves matters outside the scope of 49 C.F.R. 1180.2(d).

on the lines of N&W and Southern, the three railroads have executed a joint contract that allows N&W and Southern to operate the properties of Interstate. They also have modified a 1982 trackage rights agreement so that N&W may conduct operations over an additional 2.3 miles of Southern's line.

Since N&W, Southern, and Interstate are members of the same corporate family, both the contract to operate and the acquisition of trackage rights fall within the class of transactions that are exempt from the prior review requirements of 49 U.S.C. 11343. See 49 C.F.R. 1180.2 (d)(3). The transactions will not result in charges in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

As a condition to use of this exemption, any employees affected by the N&W-Southern contract to operate the properties of Interstate will be protected pursuant to *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980). Any employees affected by N&W's acquisition of trackage rights over Southern will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast, supra*, 360 I.C.C. 653 (1980). Together these conditions satisfy the statutory requirements of 49 U.S.C. 10505(g)(2).

Decided: February 19, 1985.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

JAMES H. BAYNE
Secretary

[SEAL]

APPENDIX D

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INTERSTATE COMMERCE COMMISSION
Washington, DC 20423

Finance Docket No. 30582 (Sub-No. 1)

SERVICE DATE APR. 3, 1985

NORFOLK AND WESTERN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND INTERSTATE RAILROAD COMPANY—EXEMPTION—CONTRACT TO OPERATE AND TRACKAGE RIGHTS

April 1, 1985

NOTICE TO THE PARTIES:

By a notice of exemption served in this proceeding on February 25, 1985, I found that (1) the joint contract of Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) to operate the properties of Interstate Railroad Company (Interstate), and (2) the acquisition by N&W of trackage rights over a 2.3-mile line of Southern are transactions "within a corporate family" within the meaning of 49 C.F.R. 1180.2 (d) (3) and, therefore, are exempt from the prior review requirements of 49 U.S.C. 11343. I also stated that use of the exemption is conditioned on the employee protective conditions usually imposed by the Commission in its approval, or exemption, of these transactions,[1] and that these

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[1] Employees who may be affected by the N&W-Southern contract to operate the properties of Interstate are protected by the conditions in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980). Employees who may be affected by N&W's acquisition of trackage rights over Southern are protected by the conditions in *Norfolk and Western Ry. Co.—Trackage Rights*—BN, 354 I.C.C. 605 (1978) as modified in *Mendocino, supra*, 360 I.C.C. 653 (1980).

conditions satisfy the statutory requirements of 49 U.S.C. 10505(g)(2).

On February 19, 1985, the Railway Labor Exectives' Association (RLEA) submitted "Supplemental Comments" to its earlier letter of protest. Although this pleading has been tendered for filing in Finance Docket No. 30582, it primarily addresses the transactions that are the subject of the notice of exemption in Finance Docket No. 30582 (Sub-No. 1).[2] Accordingly, I will accept the pleading for consideratio ndespite its late-filing. To do so will not prejudice the carriers involved.

RLEA notes that the railroads intend to (1) consolidate seniority rosters of Interstate train and engine service employees with similar rosters of N&W's Pocahontas Division, with the result that N&W employees on the consolidated roster will perform work on Interstate; (2) transfer Interstate train dispatching work to the N&W; (3) abolish four Interstate train dispatching positions; and (4) allow N&W employees to perform maintenance-of-way work on Interstate which is now being performed by employees of Southern. RLEA states its belief that the railroads may ask the affected employees to agree to these changes in their seniority and working conditions. It asserts, however, that the railroads cannot unilaterally impose the changes or require the employees to arbitrate changes in the existing labor agreements. Thus, RLEA urges that, if the transactions are exempted,

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[2] N&W, Southern, and Interstate filed a petition for exemption that was assigned Finance Docket No. 30582. The petition involved three transactions, two of which involved matters subject to 49 C.F.R. 1180.2(d)(3)—the contract to operate and the acquisition of trackage rights. The proceeding was thus bifurcated and, to the extent of these two transactions, the petition was accepted as a notice of exemption and redocketed in Finance Docket No. 30582 (Sub-No. 1). The third transaction involved in the petition related to a request for an exemption from 49 U.S.C. 10901 to construct trackage. By decision served March 8, 1985, in Finance Docket No. 30582, the Commission granted the sought exemption.

the Commission declare that the exemption does not authorize any actions that would abrogate the rights of employees under either the Railway Labor Act (45 U.S.C. 151) or 49 U.S.C. 11347.

No evidence has been presented to demonstrate that the involved railroads intend to aborgate the contractual or statutory rights of employees. Although exemptions under 49 U.S.C. 10505 do not operate to relieve carriers of applicable laws and agreements relative to labor relations, this proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

JAMES H. BAYNE
Secretary

[SEAL]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5003

UNITED TRANSPORTATION UNION,
Appellant,

v.

NORFOLK AND WESTERN RAILWAY CO., *et al.*
Appellees.

Appeal from the United States District Court
for the District of Columbia

[Filed June 30, 1987]

Before: WALD, Chief Judge, and SILBERMAN and D.H. GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 30, 1987

Opinion for the Court filed by Circuit Judge D.H. Ginsburg.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5003

UNITED TRANSPORTATION UNION

v.

NORFOLK AND WESTERN RAILWAY CO., *et al.*

[Filed Sept. 25, 1987]

Before: WALD, Chief Judge, and SILBERMAN and D.H. GINSBURG, Circuit Judges.

ORDER

Upon consideration of appellant's motion for leave to file petition for rehearing instanter and to exceed the page limitation, it is

ORDERED, by the Court, that appellant's aforesaid motion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5003

UNITED TRANSPORTATION UNION

v.

NORFOLK AND WESTERN RAILWAY CO., *et al.*

[Filed Sept. 25, 1987]

Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, Circuit Judges

ORDER

Upon consideration of appellant's motion for leave to file suggestion for rehearing *en banc* instanter and to exceed the page limitation, it is

ORDERED, by the Court, *en banc* that appellant's motion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX G

STATUTES RELIED UPON

1. Railway Labor Act, 45 U.S.C. § 151, *et seq.*
   - A. Section 2 First, 45 U.S.C. § 152 First
   - B. Section 2 Seventh, 45 U.S.C. § 152 Seventh
   - C. Section 6, 45 U.S.C. § 156
2. Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*
   - A. Section 405(b), 45 U.S.C. § 565(b)
3. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*
   - A. Section 10505, 49 U.S.C. § 10505
   - B. Section 11341(a), 49 U.S.C. § 11341(a)
   - C. Section 11347, 49 U.S.C. § 11347

I. Railway Labor Act, 45 U.S.C. § 151 *et seq.*

A. Section 2 First, 45 U.S.C. § 152 First

§ 152. General duties

First duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh, 45 U.S.C. § 152 Seventh

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 6, 45 U.S.C. § 156.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates, of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

II. Rail Passenger Service Act, 45 U.S.C. § 501 et seq.

A. Section 405(b), 45 U.S.C. § 565(b)

(b) Substantive requirements for protection. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including

continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees fair including affected terminal employees, and equitable protection by the railroad.

III. Interstate Commerce Act, 49 U.S.C. § 10101 et seq.

A. Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope; or (B) the application of a provision of this sub-

title is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 11341(a), 49 U.S.C. § 11341(a)

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corpora-

tion participating in or resulting from a transaction approved by *or exempted by* the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that *approved or exempted* transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

C. Section 11347, 49 U.S.C. § 11347

§ 11347. Employee protective arrangements in transactions involving rail carriers

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangements may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the

employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3664

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY

On Appeal from the Order of the
United States District Court for the
Western District of Pennsylvania

(D.C. Civ. No. 87-1745)

Argued October 21, 1987

Before: SLOVITER, BECKER, and MANSMANN,
Circuit Judges

(Filed Oct. 26, 1987)

John O'B. Clarke, Jr. (Argued)
Highsaw & Mahoney
Washington, D.C. 20036
Attorney for Appellant

Richard L. Wyatt, Jr. (Argued)
Akin, Gump, Strauss, Hauer & Feld
Washington, D.C. 20036
Attorney for Appellee

Clyde J. Hart, Jr. (Argued)
Interstate Commerce Commission
Washington, D.C. 20423
Attorney for Amicus Curiae
Interstate Commerce Commission

OPINION OF THE COURT
SUR MOTION FOR SUMMARY REVERSAL

SLOVITER, *Circuit Judge.*

The district court entered an order on October 8, 1987 enjoining the Railway Labor Executives' Association (RLEA), an association of the executive officers of nineteen railroad unions, from proceeding with its strike against defendant Pittsburgh & Lake Erie Railroad Company (railroad or P&LE).[1] RLEA appeals from that order contending, *inte alia*, that the district court had no jurisdiction to issue the injunction because section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, has withdrawn jurisdiction from the federal courts to enjoin the strike activity involved in this case. Before us is the motion of RLEA to summarily reverse the district court or in the alternative to stay the injunction pending appeal, on which we have held expedited oral argument.

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[1] The district court's order, although denominated a temporary restraining order, was in substance a preliminary injunction since it was issued after notice and a hearing, was not limited in time, and provided that it shall remain in effect until the court rules on the preliminary injunction for which no hearing has yet been scheduled. Accordingly, we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). *See* Professional Plan Examiners v. Lefante, 750 F.2d 282, 287 (3d Cir. 1984); San Francisco Real Estate Investors v. Real Estate Investment Trust, 692 F.2d 814, 816 (1st Cir. 1982).

I.

The following facts are not disputed for purposes of this appeal: P&LE has collective bargaining agreements with various labor organizations whose chief executive officers are members of RLEA. Some of these agreements contain provisions protecting the job security of certain covered employees for their working lives. On July 8, 1987, P&LE entered into an agreement to sell to P&LE Railco, Inc. (Railco), a newly-formed subsidiary of Chicago West Pullman Transportation Corporation, all of P&LE's rail lines and certain operating properties. The jobs of P&LE's approximately 750 employees would be affected by the sale because Railco intends to drop approximately 500 employees and does not intend to comply with or assume any of the existing labor agreements between P&LE and its unions.

The unions were notified by P&LE on July 30, 1987 of the pending agreement, and promptly wrote to P&LE noting P&LE's failure to send notice under section 6 of the Railway Labor Act, 45 U.S.C. § 156, and requesting the railroad to bargain over, among other things, the effects of the transaction on its employees.[2] P&LE responded that the transaction is controlled by the Interstate Commerce Commission (ICC) and that section 6 bargaining would usurp the ICC's authority.

On August 19, 1987, RLEA filed a complaint in the United States District Court for the Western District of Pennsylvania against P&LE to enforce the employees' rights under the Railway Labor Act. RLEA sought a declaration that the provisions of the Railway Labor Act were applicable to this transaction, a declaration that the sale could not be consummated until all Railway Labor Act dispute resolution procedures have been exhausted,

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[2] Under the Railway Labor Act, there can be no unilateral action which would change the terms and conditions of employment while the procedures of the Act are being followed. *See* 18H T. Kheel, Business Organizations: Labor Law § 50.05[1] at 50-24 (1968).

and an injunction prohibiting P&LE from completing the transaction until that time.

On September 15, 1987 the RLEA commenced a strike against P&LE. P&LE filed an answer to the complaint and a counterclaim seeking to enjoin the strike. The strike was temporarily halted by stipulation for a short period of time but continued thereafter. On September 21, 1987 the district court denied the railroad's request for a temporary restraining order against the strike, holding that such an injunction was precluded by section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, because the railroad had not complied with its obligation under section 6 of the Railway Labor Act, 45 U.S.C. § 156, to give notice, bargain, and maintain the status quo.

On September 19, 1987 the purchasing company, Railco, filed a notice of exemption with the ICC pursuant to 49 C.F.R. § 1150.31. RLEA filed a petition for a stay, a petition for rejection of the notice of exemption, and a complaint seeking an order preventing consummation of the sale. The ICC denied the request for a stay on September 25, 1987. RLEA filed a petition for revocation, which is pending.

Following the ICC's action, P&LE filed a renewed motion for a temporary restraining order, and, after a hearing on October 8, 1987, the district court entered the injunction order which is the subject of this appeal.

In essence, the district court found that the strike substantially curtails the operations of P&LE, that it would cause P&LE's customers and employees to suffer irreparable harm, and that an injunction against the strike was warranted because, by approving the sale of P&LE's assets to Railco, "[t]he ICC, and the statutes and regulations under which it operates, has eliminated the effects of the sale upon P&LE employees as a legitimate consideration in the granting of injunctive relief." Transcript of October 8, 1987 at 77.

The RLEA appeals. Because we conclude that section 4 of the Norris-LaGuardia Act divests the district court of jurisdiction to enter the injunction of October 8, 1987, we will summarily reverse,[3] without considering RLEA's additional argument relying on section 8 of the Norris-LaGuardia Act.

II.

Under the mandate of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, as revealed by the words of the statute, the unmistakably clear legislative history,[4] and a long line of Supreme Court cases, district courts lack the power to enjoin employees from exercising their right to strike. *See, e.g., Jacksonville Bulk Terminal, Inc. v. International Longshoremen's Association*, 457 U.S. 702, 708 (1982); *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 101-03 (1940).

Section 4 of the Act is explicit:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1982).

Notwithstanding this unambiguous language, the Supreme Court has, in certain limited circumstances, determined that there should be an "accommodation" of Section 4's seemingly blanket prohibition on the exercise

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[3] *See* Internal Operating Procedures of the Third Circuit, Chapter 17.

[4] *See* H.R. Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932).

of the district court's injunctive powers. For example, in *Boys Markets, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970), the Supreme Court held that a federal court is not precluded from enjoining a strike in breach of a collective bargaining agreement that contains a no-strike clause and a mandatory grievance adjustment or arbitration procedure. In light of the strong federal labor policy in favor of labor arbitration, the Court concluded that "the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy." *Id.* at 253.

P&LE argues, and the district court found, that the Norris-LaGuardia Act must be accommodated to the Interstate Commerce Act. However, the Norris-LaGuardia Act will be accommodated to another federal statute only if that statute irreconcilably conflicts with the command of the Norris-LaGuardia Act and such an accommodation is necessary to enforce some other overriding and equally clear federal labor policy.

A review of the development of the accommodation cases shows that they have focused on "the need to accommodate two statutes when both were adopted as a part of a pattern of labor legislation." *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 42 (1957). *See e.g., id.* at 39-42 (plain language of Railway Labor Act requiring that "minor" disputes be submitted to arbitration and legislative history demonstrating Congressional intent that Railway Labor Act grievance procedure be construed as a compulsory substitute for employee's economic self-help require accommodation of Norris-LaGuardia Act's anti-injunction provision); *Brotherhood of Locomotive Engineers v. Louisville and Nashville R.R. Co.*, 373 U.S. 33, 41-42 (1963) (procedure in Railway Labor Act for judicial review of monetary awards by National Railroad Adjustment Board is integral part of Railway Labor Act griev-

ance procedure which would be violated by a strike); *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 581-84 & n.18 (1971) (union could be enjoined from striking if it failed to perform its obligations under the Railway Labor Act to "exert every reasonable effort to make and maintain agreements"; the "earlier, general provisions" of the Norris-LaGuardia Act must accommodate the "subsequent, more specific provisions" of the Railway Labor Act when they are in "irreconcilable conflict"). *Cf. Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774-75 (1952) (union could be enjoined from racially discriminatory practices which are in violation of Railway Labor Act).

P&LE's argument, joined by the ICC as amicus curiae,[5] that the Interstate Commerce Act is comparable to the Railway Labor Act and that, therefore, the prohibitions of the Norris-LaGuardia Act must be accommodated to the ICC's actions, is unpersuasive. The Interstate Commerce Act, as amended, lists fifteen policies relevant to the regulation of the railroad industry. 49 U.S.C. § 10101a. These include allowing competition and the demand for services to establish reasonable rail transportation rates, minimizing the need for federal regulatory control, and promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the ICC. 49 U.S.C. § 10101a (1), (2), (3). Among the other policies listed are encouragement and promotion of energy conservation, 49 U.S.C. § 10101a(15), and encouragement of "fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101a(12). Nothing in the statutory language suggests that this incidental reference to "fair wages" converts the regulatory scheme over rail transport into a labor law.

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[5] The ICC filed a motion to intervene in this appeal. We granted it leave to file a brief as amicus curiae and to present oral argument.

Pursuant to the Act, the ICC has been given authority to approve various transactions, including acquisitions, involving rail carriers. When there is a consolidation, merger or acquisition involving existing rail carriers, the ICC must impose certain employee protective provisions. 49 U.S.C. § 11347. However, it is P&LE's position, and the RLEA concedes for purposes of this appeal, that the P&LE sale is not governed by section 11347, but that the transaction falls within the ambit of 49 U.S.C. § 10901 covering the acquisition of a rail carrier's operation by a non-carrier. Section 10901 gives the ICC discretion to require the imposition of employee protective provisions, but deos not make imposition of these provisions mandatory.[6] *Compare* 49 U.S.C. § 10901(e) ("Commission *may* require" labor protective provisions) (emphasis added) *with* 49 U.S.C. § 11347 ("Commission *shall* require" such provisions) (emphasis added). In fact, on December 19, 1985, the ICC adopted final rules exempting from regulation almost all acquisitions and operations under 49 U.S.C. § 10901, *Ex parte No. 392 (Sub-No. 1)*, 1 I.C.C.2d 810 (1985), *review denied sub nom., Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987), thereby placing upon a protester the burden of filing a petition to revoke the exemption. The ICC stated that such revocation would be granted only in an "extraordinary case" by "an exceptional showing of circumstances" justifying the imposition of labor protection. *Ex Parte No. 392*, 1 I.C.C.2d at 815. No such

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[6] Section 10901(e) provides that "[t]he Commission *may* require any rail carrier proposing both to construct and operate a new railroad line to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected" by a decision to operate a new railroad line (emphasis added). The ICC has suggested that its authority to impose labor protection is not limited by the plain language of this section, but instead extends to any transaction covered by section 10901. *See* Ex Parte No. 392 (Sub-No. 1), 1 I.C.C. 2d 810, 815 (1985), *review denied sub nom.*, Illinois Commerce Comm'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987).

revocation has been granted since the decision in *Ex Parte No. 392. See Central Michigan Ry.—Acquisition and Operation*, ICC Finance Docket No. 31059, served September 4, 1987 (unpublished) (Dissenting opinion of Vice-Chairman Lamboley).

Neither 49 U.S.C. § 10901 nor 49 U.S.C. § 11341, the other provision relied on by P&LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms. Neither the ICC nor P&LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

Arguments comparable to those made by P&LE were rejected by the Supreme Court in *Order of R.R. Telegraphers v. Chicago & Northwest Ry. Co.*, 362 U.S. 330 (1960). In that case, the Supreme Court held that the absolute prohibition of the Norris-LaGuardia Act against enjoining strikes growing out of any labor dispute deprived the district court of the jurisdiction to enjoin a strike that arose out of a railroad's decision to close several stations. Although the closings had been approved pursuant to the Interstate Commerce Act by the relevant state public utility commissions, and the railroad argued that the strike ran "counter to the congressional policy expressed in the Interstate Commerce Act to foster an efficient national railroad system," *id.* at 342, the Court

held controlling "other legislation . . . like the Railway Labor and Norris-LaGuardia Acts [where] Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.* The majority of the Court rejected the argument of Justice Whittaker, writing for four dissenters, that because Congress had given the ICC and the public utility commissions exclusive jurisdiction over the regulation of station closings, the issue was removed from the field of collective bargaining. The Court also rejected the argument (similar to that made by P&LE before us) that a failure to enjoin the strike could lead to "the financial debilitation" of the railroad. *Id.* at 342. The Court made clear that such arguments must be addressed to Congress, and not to the courts which are obligated to follow the provisions of the Norris-LaGuardia Act. Significantly, at the time of the *Telegraphers* decision, section 5(2)(f) of the Act, the predecessor of 49 U.S.C. § 11347, provided that the Commission "*require* a fair and equitable arrangement to protect the interests of the railroad employees affected." Act of Sept. 18, 1940, ch. 722, Title I § 7, 54 Stat. 906-07 (repealed 1978); current version at 49 U.S.C. § 11347. (emphasis added).

The *Telegraphers* case was relied on by the Fifth Circuit in its decision holding that a district court had no jurisdiction to enjoin a strike protesting changes in working conditions that resulted from consolidation of certain operations of several railroads, even though the ICC had approved the transaction. *See Texas and New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). Judge Rives, writing for the court, explained, in reasoning we find applicable and persuasive, that the Interstate Commerce Act is not one of those rare statutes to which the Norris-LaGuardia Act must be accommodated. Such an accommodation need only be made

"where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act, 29 U.S.C. § 141 *et seq.*, has 'channelled these economic forces [capital and labor] . . . into special processes intended to compromise them' [*Brotherhood of R.R. Trainmen v. Chicago River & Indiana Ry. Co.*] (353 U.S. at 41, 77 S. Ct. at 640) and where these processes would be frustrated without injunctive aid." 307 F.2d at 157 (ellipsis and first brackets in original). The court continued:

> The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Id. at 158. This language is directly applicable here, since, in the absence of any provision requiring "extensive negotiations and bargaining," RLEA and the employees it repreesnts would be relegated to "a small voice of protest" without the possibility of either negotiation or economic self-help.[7]

Just last Term the Supreme Court reiterated the Norris-LaGuardia Act policy barring judicial intervention in labor disputes. In *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987), the Court unanimously held that the district court has no jurisdiction to enjoin a strike against a railroad which took place after the parties exhausted the settlement procedure mandated by the Railway Labor Act. The Court declined to narrow the definition of "labor dispute" in the Norris-LaGuardia

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[7] It is noteworthy that in *Texas and New Orleans R.R.*, the court held the strike could be maintained even though the ICC had issued certain labor protective provisions, 307 F.2d at 154.

Act, and reaffirmed that "the legislative history leaves no doubt that Congress intended the Norris-LaGuardia Act to cover the railroads." *Id.* at 1848. It viewed Congress' policy expressed in the Norris-LaGuardia Act as inconsistent with a narrow construction of the statute and left it to Congress to restore federal court power to enjoin strikes and picketing if it so chooses. *Id.* at 1849-50, 1855.[8]

We are, of course, cognizant that a strike will cause economic hardship to the railroad, its shippers, and the community. Such harm is a consequence of the congressional policy leaving resolution of disputes to economic self-help by the parties. We intimate no view as to whether the provisions of the Railway Labor Act are applicable to this dispute so that the district court would be entitled to enjoin the strike while that Act's dispute resolution mechanisms are underway. RLEA's complaint

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[8] The district court relied on Missouri Pacific R.R. Co. v. United Transp. Union, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987), where the court held that because of ICC approval of a rail consolidation it could enjoin a strike over the employer's refusal to bargain over the effects of that transaction. That decision is distinguishable.

First, the statutory exemption relied on by the Eighth Circuit (a "carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction," 49 U.S.C. § 11341(a)) applies only to transactions "approved by or exempted by the Commission *under this subchapter*." (emphasis added). "[T]his subchapter" refers to Subchapter III of Chapter 113 of the Interstate Commerce Act, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not to 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

Second, the Eighth Circuit itself noted that "[a]ffected employees are not left out in the cold, because § 11347 *requires* the ICC to impose employee protective conditions." *Missouri Pacific*, 782 F.2d at 112 (affirming and quoting the district court's opinion, 580 F. Supp. 1490, 1505-06) (emphasis added). However, as noted in the text, there is no such requirement under 49 U.S.C. § 10901(e).

seeking a declaration that the Railway Labor Act is applicable to this dispute is the merits issue before the district court. The only issue before us is the jurisdiction of the district court to issue the order of October 8, 1987.

Because we have concluded that the district court was without jurisdiction to enter an injunction, we will reverse that order and remand this case for further proceedings.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3664

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant

vs.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY

(D.C. Civil No. 87-1745)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: Sloviter, Becker and Mansmann, *Circuit Judges*

ORDER

On consideration of Appellant's Motion for Summary Reversal which was argued by counsel October 21, 1987, it is now here ordered and adjudged by this Court that the motion is granted and the order of the said District Court entered October 8, 1987, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings.

ATTEST:

/s/ Sally Mvros
Clerk

October 26, 1987